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IN THE

Supreme Court of the United States

DAVID B. PASQUANTINO,
CARL J. PASQUANTINO &
ARTHUR HILTS,
Petitioners,

v.

UNITED STATES OF AMERICA
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTION PRESENTED

Whether the federal wire fraud statute (18 U.S.C. § 1343) authorizes criminal prosecution of an alleged fraudulent scheme to avoid payment of taxes potentially owed to a foreign sovereign, given the lack of any clear statement by Congress to override the common law revenue rule, the interests of both the Legislative and Executive Branches in guiding foreign affairs, and this Court's prior rulings concerning the limited scope of the term "property" as used in the wire fraud statute.

PARTIES TO THE PROCEEDING

The Petitioners in this Court are Arthur Hilts, Carl J. Pasquantino, and David B. Pasquantino. The Respondent is the United States of America.

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PETITION FOR CERTIORARI

Petitioners, David B. Pasquantino, Carl J. Pasquantino, and Arthur Hilts, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals affirming the convictions (App., *infra*, 1a-37a) is reported at 336 F.3d 321 (4th Cir. 2003). The original panel opinion reversing the convictions (App., *infra*, 38a-53a) is reported at 305 F.3d 291 (4th Cir. 2002). The oral opinion of the district court denying Petitioners' motion to dismiss the indictment is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 2003. On September 29, 2003, this Court granted an extension of time in which to file the present petition until November 15, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 18, United States Code, Section 1343 states:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

On April 13, 2000, a federal grand jury in the Northern District of Maryland returned a multi-count indictment charging David B. Pasquantino, Carl J. Pasquantino and Arthur Hilts (collectively, "Petitioners"), along with four other individuals, on six counts of wire fraud and aiding and abetting wire fraud, in violation of 18 U.S.C. §§ 2 and 1343. The indictment alleged that Petitioners had engaged in a scheme to defraud Canada and the Province of Ontario of liquor duties and excise taxes. According to the indictment, Petitioners and their codefendants had used interstate telephone calls to order liquor from suppliers in Maryland, which they then transported into Canada without payment of appropriate Canadian taxes. App. 57a-64a.

Petitioners moved to dismiss the indictment on the ground that the United States did not have a justiciable property or

monetary interest in their putative smuggling scheme against Canada, a foreign sovereign. On September 7, 2000, the district court denied Petitioners' motion, and the case was tried to verdict.

The evidence submitted at trial demonstrated that all domestic taxes had been paid. App. 40a. The only testimony regarding the alleged failure to pay taxes to the government of Canada or the Province of Ontario came in the form of testimony from a Canadian Customs Officer, who provided no evidence that Canada or Ontario taxed liquor imports at the time of the alleged offense or that taxes were due and owing upon entry into Canada, or that any Canadian court or agency had issued any judgment or finding of fact as to the amount of taxes that Petitioners allegedly owed. *See* App. 36a-37a; 54a-56a.

Petitioners were convicted on February 13, 2001. Petitioners were sentenced on June 8, 2001, with Messrs. Carl and David Pasquantino each receiving fifty-seven months' imprisonment on each count, to be served concurrently, and Mr. Hilts receiving twenty-one months. Petitioners timely filed a notice of appeal on June 8, 2001.

On September 30, 2002, a panel of the United States Court of Appeals for the Fourth Circuit reversed the convictions. The panel asserted that although Canada's right to collect accrued taxes was a property right, the "determination of whether Canada was actually or would have been *entitled to the tax revenues* involves an inquiry into the validity and operation of a foreign revenue law." App. 44a (emphasis in original). The panel concluded that "principles underlying the revenue rule"—which the panel described as a "long-standing common law doctrine providing that courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns"—bar the inquiry into Canada's entitlement to tax revenue and "therefore bar appel-

lants' prosecution in this case." App. 44a-46a. The Fourth Circuit took note of a split in authority on what it described as a "difficult question indeed," and held that the decision of the First Circuit in *United States v. Boots*, 80 F.3d 580 (1st Cir. 1996), a case in which the court found that the revenue rule barred a wire fraud prosecution based on failure to pay foreign taxes, was better reasoned than the "flawed" decision of the Second Circuit in *United States v. Trapilo*, 130 F.3d 457 (2d Cir. 1997), which reached the opposite conclusion. App. 46a-50a. The panel also rejected the notion that the revenue rule provided any basis for treating civil and criminal cases differently. App. 49a at n.23.[1]

The Fourth Circuit granted a request by the government for rehearing en banc, and on July 18, 2003, affirmed the decision of the district court and reinstated petitioners' convictions, finding that the revenue rule is permissive, not mandatory, and applies only to foreign tax judgments, not unadjudicated tax claims. App. 11a & n.3. In addition, the en banc majority acknowledged that there was no evidence that the foreign taxes at issue in this case had been in place at the time of Petitioners' alleged conduct, but held nonetheless that the jury was entitled to draw such an inference from the fact that the Canadian Customs official who testified as to the existence of Canadian tax laws at the time of trial had been assigned to investigate Petitioners based on the conduct of which they were convicted. App. 18a-20a.[2] Judge Gregory and Judge Michael dissented, arguing that the revenue rule barred Petitioners' conviction. App. 27a-37a.

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[1] Judge Hamilton dissented, arguing that the revenue rule did not bar the prosecution. App. 50a-53a.

[2] The en banc panel also affirmed the District Court's sentencing determination, which calculated intended loss under U.S.S.G. § 2F1.1(b)(1)(L) based upon estimated tax revenue loss to the Canadian government. App. 24a-26a.

REASONS FOR GRANTING THE PETITION

I. THERE IS A CLEAR AND WELL-DEVELOPED CONFLICT OF AUTHORITY AMONG THE UNITED STATES COURTS OF APPEALS REGARDING THE PROPER SCOPE OF SECTION 1343 IN LIGHT OF THE REVENUE RULE.

A. The Underpinnings of the Conflict

1. *The Revenue Rule*

Recognized for hundreds of years by the United States and foreign governments, the revenue rule is a principle of common law holding that the courts of one sovereign do not give effect to the revenue laws of another sovereign.[3] Over the centuries, the rule has received numerous formulations of varying breadth and force, ranging from categorical refusal to take any notice of a foreign nation's revenue laws,[4] to the nar-

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[3] *See, e.g., Sun Oil Co. v. Wortman*, 486 U.S. 717, 740 n. 3 (1988) (Brennan, J., concurring) (noting the rule's continued existence in the nation-to-nation setting); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 413-14 (1964) ("[A] court need not give effect to the penal or revenue laws of foreign countries."); *Oklahoma v. Gulf, Colo. & Santa Fe Ry. Co.*, 220 U.S. 290, 299 (1911) ("The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties.") (quoting *Wisconsin v. Pelican Ins. Co. of New Orleans*, 127 U.S. 265, 290 (1888), overruled in part by *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 278 (1935)).

[4] *See, e.g., Government of India v. Taylor*, [1955] A.C. 491, 508 (H.L.) ("We proceed upon the assumption that there is a rule of the common law that our courts will not regard the revenue laws of other countries: it is sometimes, not happily perhaps, called a rule of private international law: it is at least a rule which is enforced with the knowledge that in foreign countries the same rule is observed."); *State of Colorado v. Harbeck*, 232 N.Y. 71, 85, 133 N.E. 357 (1921) ("The rule is universally recognized that

rower statement that "one sovereignty may not maintain an action in the courts of another state for the collection of a tax claim." *United States v. First Nat'l City Bank*, 321 F.2d 14, 23-24 (2d Cir. 1963). Even in courts where a narrower formulation has been used, there has generally been an understanding that the rule is not limited to attempts at direct enforcement of foreign revenue judgments or claims, but applies as well to actions brought under domestic law that would have the same effect. *See, e.g., Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 131 (2d Cir. 2001) (holding that a civil RICO suit predicated on claims of wire fraud aimed at defrauding Canada of revenue was "in essence an indirect attempt to have a United States court enforce Canadian revenue laws, an exercise barred by the revenue rule."), *cert denied*, 537 U.S. 1000 (2002).[5]

In this Court, the United States has taken the position that "[t]he revenue rule is a long established and widely accepted principle of the common law under which courts of one sov-

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the revenue laws of one state have no force in another."); *Planche v. Fletcher*, 99 Eng. Rep. 164, 165 (K.B. 1779) (Lord Mansfield) ("One nation does not take notice of the revenue laws of another."); *Holman v. Johnson*, 98 Eng. Rep. 1120, 1121 (K.B. 1775) (Lord Mansfield) ("For no country ever takes notice of the revenue laws of another.").

[5] *See also United States v. Harden*, [1963] S.C.R. 366, 371 (Can.) (rejecting the enforcement of a stipulation of settlement of a tax case based on the "special principle that foreign States cannot directly or indirectly enforce their tax claims [in our courts]") (quoting Taylor, A.C. at 515); *Stringam v. Dubois*, [1993] 3 W.W.R. 273, 282-83 (Alta.Ct.App.) (barring claim of estate executor to compel sale of Canadian property because sale proceeds would be used to satisfy American estate taxes); Felix D. Strebel, *The Enforcement of Foreign Judgments & Foreign Public Law*, 21 Loy. L.A. Int'l & Comp. L.J. 55, 75 (1999) (reviewing Canadian cases which hold that "it is a well-established rule of public policy that Canadian law forbids a foreign state from suing, either directly or indirectly, in Canada for taxes alleged to be due to the state").

ereign will not enforce the tax judgments and unadjudicated tax claims of another sovereign." Brief for the United States as Amicus Curiae at 7, *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.* (S.Ct. Case No. 01-1317) (Oct. 2002) (opposing certiorari). "[N]umerous domestic and foreign courts have applied the rule to bar claims that, *in substance*, seek to enforce foreign revenue laws." *Id.* at 8 (emphasis added); *see also* Brief of the National Association of Manufacturers and United States Chamber of Commerce as Amici Curiae at 7, *R.J. Reynolds*, 268 F.3d 103 (2d Cir. 2001) (No. 00-7972) ("NAM Amicus Brief") (Theodore B. Olson, Counsel of Record) ("It is beyond dispute that the Revenue Rule has been consistently applied in the international community. In fact, no court has failed to apply the rule when asked to give effect to the revenue laws of a foreign sovereign.").

As with most longstanding common law doctrines, courts invoking the revenue rule have articulated various rationales for its existence. All of them, however, rest ultimately on the principle that while courts are generally willing to vindicate the private rights of individuals within their jurisdiction, and will sometimes apply foreign law in doing so, penal laws—of which revenue laws are a subset—are understood to be different in nature. Such laws embody the political will of a particular sovereign and enforce obligations imposed on individuals by fiat, often for purely political ends. This is particularly true of revenue laws, whose most basic object is appropriation of the resources a state regards as necessary to maintain its existence and pursue its interests.[6] At the same

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[6] *See Taylor*, [1955] A.C. at 511 ("[A] claim for taxes is but an extension of the sovereign power which imposed the taxes, and ... an assertion of sovereign authority by one State within the territory of another ... is (treaty or convention apart) contrary to all concepts of independent sovereignties.").

time, revenue laws are frequently used to further various other state policies particular to the sovereign enacting them, such as maintenance of an ideologically desirable distribution of wealth, enforcement of political and moral judgments about certain persons, activities or products,[7] and advancement of the state's perceived industrial and commercial interests.[8] The revenue rule reflects a widespread recognition that the extent to which one nation will assist another nation in pursuing these types of policies is a matter properly decided by those to whom the treaty power is entrusted, not by normal operation of the court system. For courts to accept adjudication of such matters would routinely put them in the position of passing on the validity and construction of another nation's revenue laws and determining whether the policy judgments they embody were sufficiently compatible with those of our own political system to be enforced.[9]

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[7] *See, e.g., R.J. Reynolds*, 268 F.3d at 113 ("How would we respond if . . . a foreign nation imposed an immigration tax on members of a particular religious group or racial minority?"); *Pasquantino*, 305 F.3d 291, 297 n.9 ("[I]magine that Canada imposed an import duty on bibles, and appellants schemed to smuggle bibles rather than liquor. The revenue rule was created in part to avoid these types of political and foreign policy-based determinations.") (subsequently vacated panel opinion); App. 48a.

[8] *See, e.g., R.J. Reynolds*, 268 F.3d at 113 ("How would we respond if a foreign sovereign asked us to help enforce a tax designed to render it very expensive to sell United States newspapers in that nation? Or to make the inclusion of United States-made content in machinery built in that foreign country prohibitively expensive?").

[9] *See, e.g., Peter Buchanan L.D. v. McVey*, [1955] A.C. 516, 529 (Ir.H.Ct.1950), cited in *Sabbatino*, 376 U.S. at 437-38:

> [M]odern history [is not] without examples of revenue laws used for purposes which would not only affront the strongest feelings of neighboring communities but would run counter to their political aims and vital interests . . . . So long as these possibilities exist it would be equally unwise for the courts to permit the enforcement of the revenue claims of foreign States or to attempt to discriminate between those claims which they would and those which they would not enforce. Safety lies only in universal rejection.

See also Moore v. Mitchell, 30 F.2d 600, 604 (2d Cir. 1929):

> [A] court will not recognize those [liabilities] arising in a foreign state, if they run counter to the 'settled public policy' of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic state . . . . No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper.

(L. Hand, J., concurring), *aff'd on other grounds*, 281 U.S. 18 (1930).

This case raises an important issue regarding the application of the revenue rule: whether despite the existence of the rule, the Executive Branch can nonetheless prosecute for wire fraud where the only alleged intended loss is a loss of tax revenue to a foreign sovereign. As explained in more detail below, this is an issue as to which the courts of appeals are divided and which raises important separation-of-powers and other issues, as Congress has not authorized the prosecutions in question but rather has insisted upon reciprocity with foreign nations on matters of tax enforcement, a condition that is not satisfied in this case.

2. *The Requirement that a "Scheme to Defraud" Under Section 1343 Be Aimed at "Money or Property"*

Petitioners were convicted under the federal wire fraud statute, 18 U.S.C. Section 1343. This statute provides for criminal punishment of anyone who, "having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," uses some means of interstate transmission in furtherance of that scheme. 18 U.S.C. § 1343 (2002). The "money or property" limitation

is inherent in the meaning of "scheme or artifice to defraud," so conduct is not actionable under the statute unless its aim is to deprive someone of actual money or property. *See McNally v. United States*, 483 U.S. 350, 360 (1987).[10]

This Court has also refused efforts by the Government to expand the reach of the mail and wire fraud statutes by applying them to state interests not falling within the traditional concept of "property." *See Cleveland v. United States*, 531 U.S. 12 (2000). In this Court's analysis, the determination of whether a government has been defrauded of property involves an inquiry into whether the government's interest is primarily regulatory or fiscal in nature, the extent to which the relevant interest is transferable, and the extent to which the government has put its own assets at risk, among other factors. *Id.* at 22-24. *Cleveland* held that a fraudulent scheme aimed at obtaining an unissued gaming license was not actionable under the mail fraud statute, because such a license did not constitute "property" in the hands of the state. *See id.* at 24. To allow such a prosecution, this Court stated, would be to "approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress."[11] *Id.* This case involves a similar sweeping expan-

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[10] The statute has since been amended by Congress to also include schemes to deprive someone of the "right to honest services." *See Cleveland v. United States*, 531 U.S. 12, 19-20 (2000). This aspect of the statute is not at issue in this case. The wire fraud statute, 18 U.S.C. § 1343, is the "lineal descendant" of the mail fraud statute, 18 U.S.C. § 1341. *McNally*, 483 U.S. at 374 (citation and internal quotation marks omitted). "Because these statutes use the same relevant language, they are analyzed in the same way." *See, e.g., United States v. Slevin*, 106 F.3d 1086, 1088 (2d Cir. 1996).

[11] This Court also stated in *Cleveland* that the rule of lenity is "especially appropriate" in interpreting the scope of "property" under Section 1341, for the reason that this statute—like Section 1343—defines a predicate RICO offense. *See* 531 U.S. at 25.

sion, one that seeks to treat potential revenue claims of a foreign sovereign—whether or not reduced to final judgments or actual assessments and whether or not Congress has approved cooperation in this sphere—as "property."

B. The Circuit Split over Application of Section 1343 To Schemes Whose Sole Object Is the Avoidance of Taxes Potentially Owed to a Foreign Sovereign.

Four Circuits have addressed the question whether efforts to avoid paying taxes to a foreign sovereign constitute actionable mail fraud or wire fraud. The cases have resulted in doctrinal disarray.

1. *The First Circuit*

In *United States v. Boots*, 80 F.3d 580 (1st Cir. 1996), the defendants had been convicted of wire fraud on the basis of a scheme to deprive Canada of revenue by transporting tobacco into the country without paying excise duties at the border. The court reasoned that because the alleged scheme to defraud had as its sole object the violation of Canadian revenue laws, the convictions could be upheld only on the basis of a determination that the petitioners had intended to violate those laws. *See* 80 F.3d at 587. This in turn would require the court to pass on any challenges to those laws and any claims that the petitioners' actual or intended actions would not actually have violated them. *See id.* Because the court would thus be "effectively passing on the validity and operation of the revenue laws of a foreign country," the First Circuit found that "the important concerns underlying the revenue rule [we]re implicated." *Id.*

In the First Circuit's view, even though the case did not require it "to enforce a foreign tax judgment as such," upholding the conviction would "amount functionally to penal enforcement of Canadian customs and tax laws." *Id.* In addi-

tion to violating the long-standing revenue rule, the court found that this would conflict with the policy of Congress, embodied in 18 U.S.C. § 546, that the United States should criminally penalize the smuggling of goods only into those foreign countries that have a reciprocal law. *See* 80 F.3d at 588. Given these inherent tensions, the First Circuit found that if Congress wished to authorize courts to apply the wire fraud statute to evasion of foreign tax obligations, "'it must speak more clearly than it has.'" *Id.* (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987)). Accordingly, the court ruled that schemes to avoid payment of taxes to a foreign sovereign are not schemes to defraud within the meaning of Section 1343. *Id.*

2. *The Second Circuit*

The Second Circuit has addressed the application of the revenue rule to mail fraud or wire fraud involving nonpayment of foreign taxes on three different occasions. In *United States v. Trapilo*, 130 F.3d 547 (2d Cir. 1997), the court reviewed a district court's dismissal, in accordance with *Boots*, of an indictment alleging wire fraud on the basis of a "scheme to defraud" whose sole object was the importation of liquor into Canada in avoidance of Canadian revenue law. *See* 130 F.3d at 548-49. The court reversed, holding that the defendants' actions fell within the language of the statute and that the First Circuit in *Boots* had been mistaken in believing the revenue rule to be implicated by such a prosecution. In reaching this result, the Second Circuit reasoned that there was no need to pass on the validity of the underlying Canadian revenue law, because the only question was whether the defendants had used interstate wires in furtherance of a scheme *intended* to defraud someone of money or property. *See* 130 F.3d at 552. In the *Trapilo* court's view, the substance of the Canadian law would be relevant only to the question whether the defendants had *succeeded* in defrauding the Canadian government of money or property. *See id.* Because the ultimate success of a scheme to defraud is not an element of the offense, the court held that the revenue rule was not implicated by the prosecution. *See id.* at 552-53.[12]

The Second Circuit undermined the reasoning of *Trapilo* three years later, when it decided *United States v. Pierce*, 224 F.3d 158 (2d. Cir. 2000). In *Pierce*, the court reversed the convictions of several of the same defendants whose prosecution it had allowed to proceed in *Trapilo*. *See* 224 F.3d at 160. The court observed that the defendants were "not accused of scheming to defraud the Canadian government of its property, but of its *right* to obtain property, its *right* to be paid money."[13] *See id.* at 165 (emphases in original). Accordingly, the Second Circuit held that the prosecution had to prove that such a right actually existed. *Id.* Whereas the court in *Trapilo* had reasoned that legal impossibility was irrelevant to a defendant's having formed the requisite intent to defraud, *see* 130 F.3d at 552 n.9, in *Pierce* the court recognized that the statutory requirement of a fraudulent scheme directed at "money or property" could not be satisfied if there were no Canadian statute creating the "property" by actually imposing the import duty in the first place. *See* 224 F.3d at 166. The prosecution's failure to introduce evidence at trial

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[12] Two of the defendants in *Trapilo* sought review in this Court. In opposing the petition for certiorari, the government recognized the existence of a direct conflict between the Second Circuit's decision in *Trapilo* and the First Circuit's decision in *Boots*. The government, however, urged this Court to defer review because only two circuits had then passed on the issue. *See* Brief For The United States In Opposition at 5, *Pierce v. United States* (S.Ct. Case Nos. 97-1792; 97-8964) (July 1998).

[13] The Second Circuit announced its decision in *Pierce* in August 2000, three months before this Court decided *Cleveland*. The Second Circuit did not address whether the convictions should be set aside for the independent reason that the right to receive taxes was not an adequate property interest under the wire fraud statute.

demonstrating the existence of such a revenue law thus required that the convictions be reversed.[14] *See id.*

One year later, in *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001), the Second Circuit was called upon to decide whether, given that it had held that evasion of foreign taxes may constitute a "scheme to defraud" under Section 1343, the foreign sovereign victimized by such a scheme could seek damages in a civil action under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). In a thorough opinion, the Second Circuit recognized the "continuing vitality" of the revenue rule. *See* 268 F.3d at 109-26. The court also acknowledged that this Court's holding in *Cleveland* had cast doubt upon the correctness of *Trapilo* and *Pierce*. *See id.* at 124 n.27.[15]

The defendant tobacco companies in *R.J. Reynolds* were alleged to have engaged in a pattern of smuggling tobacco products into Canada without paying the applicable import taxes. *See id.* at 105. Under the Second Circuit's holdings in *Trapilo* and *Pierce*, such conduct could clearly be prosecuted

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[14] The court attempted to reconcile its holding with *Trapilo* by making a distinction between the requirement that the government demonstrate the "existence" of a revenue law creating the alleged property right, and the need for a court to examine the validity and operation of such a law. *See Pierce*, 224 F.3d at 167. The court did not explain how a law that is in "existence," but invalid or inapplicable to the defendants' intended operations, could give rise to a property interest any more than a non-existent one.

[15] The Second Circuit will be required to confront the effect of *Cleveland* on the rule of *Trapilo* and *Pierce* in the currently pending case *Fountain v. United States*, 2d Cir. Case No. 03-2188. This is an appeal brought by a habeas petitioner on the ground that his conviction under the rule announced in *Trapilo* violates this Court's ruling in *Cleveland*. The present case provides a better vehicle for review, as it presents the issue in the context of a direct appeal, without the procedural hurdles potentially raised by a habeas petition.

as wire fraud without violating the revenue rule. Moreover, as this Court had pointed out in *Cleveland*, wire fraud has been expressly designated by Congress as a "racketeering activity" that may serve as the basis of a civil RICO action. Nevertheless, the Second Circuit concluded that to allow a foreign sovereign to bring such an action *would* violate the revenue rule and that the civil RICO statute should not be construed to bring about this result. The court attempted to reconcile this holding with *Trapilo* and *Pierce* by asserting that—even though violation of the identical statute was at issue in both cases—a civil RICO suit predicated on wire fraud would require the court to pass on whether the underlying fraud had been successful, whereas a criminal prosecution for wire fraud would not. *See* 268 F.3d at 108-09. The court also stated that, unlike a criminal prosecution, a civil action would require it to quantify the exact amount of unpaid revenue in order to determine damages. *See id.* Such determinations, the court reasoned, would directly implicate the core concerns of the revenue rule, and absent clear evidence of congressional intent to abrogate this rule, principles of statutory construction required it to construe the statute in a manner that preserved the revenue rule. *See id.* at 127.

In dissent, Judge Calabresi asserted that there is no basis in either the revenue rule or federal law for interpreting the scope of the wire fraud statute differently in criminal and civil cases, so that there was no way to distinguish *Trapilo* and *Pierce* from *R.J. Reynolds*, as the majority had sought to do. *See id.* at 138-40 (Calabresi, J., dissenting). Judge Calabresi further refuted the panel's distinction by pointing out that in the event of a conviction under *Trapilo* and *Pierce*, the sentencing guidelines would require a sentence to be imposed based on the amount of tax revenue lost, thus making necessary precisely the same degree of involvement with and inter-

pretation of Canadian law that the court claimed to fear in connection with the RICO suit. *See id.*[16]

Following the decision in *R.J. Reynolds*, the Attorney General of Canada filed a petition for certiorari, and this Court called for the views of the Solicitor General. The Solicitor General argued that when Congress authorized suits to recover for racketeering injuries, it did not intend to "permit the enforcement of *any* tax claim by *any* foreign government," regardless of whether the foreign country would permit a similar claim in its courts and regardless of the careful limits on such enforcement that have been embodied in bilateral treaties. Brief for United States as Amicus Curiae at 14, *Attorney General of Canada v. R.J. Reynolds*, S. Ct. Cas. No. 01-1317 (Oct. 2002). The Petitioners herein contend that precisely the same argument applies to Congress's authorization in general terms of prosecutions to punish schemes to defraud someone of property.

3. *The Fourth Circuit*

As already noted, the original Fourth Circuit panel in the present case agreed with the reasoning of the First Circuit in *Boots*, and reversed Petitioners' convictions on the ground that any determination as to whether Canada was actually, or would at some point have been, entitled to the tax revenues in question would involve an inquiry into the validity and operation of a foreign revenue law, and such a determination is barred by the revenue rule. *See* App. 44a. The panel majority rejected the Second Circuit's approach in *Trapilo* and *Pierce*, which recognized the need for the government to prove the *existence* of a foreign law giving rise to the alleged property right, while denying any need to pass on its validity

[16] Indeed, this is precisely what happened to Petitioners in the present case. *See* App. 24a-26a; 35a-36a.

and scope: "[R]ecognizing the *existence* of a law is inherently and inescapably tied to recognizing the *validity* and *scope* of that law." *See* App. 49a-50a. The Fourth Circuit en banc panel that affirmed Petitioners' convictions did not dispute this basic point, but rather avoided it completely. The en banc court accomplished this by giving the revenue rule a very narrow reading that called only for the "nonenforcement of foreign tax judgments," as opposed to the "nonrecognition of foreign revenue laws."[17] App. 11a. Under this narrow reading, the government's use of intended loss figures as a basis for sentencing also did not implicate the prohibitions of the revenue rule. *See* App. 24a-26a.

4. *The Eleventh Circuit*

Finally, the Eleventh Circuit has also addressed the application of the revenue rule to claims based on wire fraud. In *Republic of Honduras v. Philip Morris Cos.*, 341 F.3d 1253 (11th Cir. 2003), the court affirmed the dismissal of a civil RICO suit brought by a foreign sovereign to recover taxes that were allegedly evaded by means of smuggling tobacco into its territory. *See id.* at 1255. The court did so on the basis of a construction of the revenue rule that required the court to abstain from considering any claims that would require the court to "pass judgment on unadjudicated foreign tax claims for which the political branches of our government have not provided an enforcement mechanism." 341 F.3d at 1261. In this connection, the Eleventh Circuit cited approvingly the First Circuit's statement in *Boots* that, "[w]here a domestic court is effectively passing on the validity and operation of the revenue laws of a foreign country, the important concerns underlying the revenue rule are implicated." 341 F.3d at 1256 (citing *Boots*, 80 F.3d at 587). While a

[17] As noted above, the United States has not taken such a narrow view of the revenue rule. *See supra* at 6-7.

criminal prosecution under the wire fraud statute was not before the Eleventh Circuit, its reasoning and its approval of *Boots* suggest that it would regard such an action as barred by the revenue rule.

As shown by these significant inter-circuit—and, in the case of the Second and Fourth Circuits, intra-circuit—disagreements, the question whether the federal wire fraud statute applies to schemes for avoiding payment of taxes to foreign sovereigns is a difficult and contentious one that has grown in significance over time and that only this Court can resolve. The various majority and dissenting opinions issued by these four circuits, while failing to achieve a coherent doctrine with regard to the interplay of the revenue rule and Section 1343, have raised and discussed virtually every facet of the problem.

II. THE FOURTH CIRCUIT'S RULING IN THIS CASE CREATES SERIOUS PROBLEMS WITH FAR-REACHING CONSEQUENCES

A. The Holdings of both the Second and Fourth Circuits Allow the Executive to Make and Implement Policy Regarding Enforcement of Foreign Revenue Laws Without Clear Authorization from—and in Direct Conflict with the Policies of—the Legislature

The Second and Fourth Circuits have ruled that prosecutions such as the one at issue in this case do not raise any problem of separation of powers in foreign affairs, because such prosecutions are brought by the Executive Branch, which has the constitutional authority to conduct foreign policy, and which will not bring such a case if it conflicts with U.S. interests in that sphere. *See Pasquantino*, 336 F.3d at 331 (App. 14a); *R.J. Reynolds*, 268 F.3d at 123. This conclusion overlooks the fact that the Legislative Branch is also responsible for foreign affairs, and has an interest in determining when and under what circumstances the United States will be involved in enforcing tax obligations of other countries. *See* U.S. Constitution, Art. 1, sec. 8 (giving Congress the power to regulate commerce with foreign nations); *id.* at Art. 2, sec. 2 (requiring that treaties be made with consent of Senate). The question presented is whether the wire fraud statute—which lacks any express reference or facially evident relation to foreign policy—can properly be read as conferring carte blanche in these matters to the Executive. There are a number of reasons for believing that the Executive's exercise of unilateral discretion in this area conflicts with relevant policies enacted by the Legislature.

The United States has over the years entered into several tax treaties with foreign sovereigns that provide for information exchange and sometimes for limited collection assistance. *See R.J. Reynolds*, 268 F.3d at 115-19 (reviewing history of such agreements). As the Second Circuit has recognized, review of these treaties shows that "the political branches of our government have clearly expressed their intention to define and strictly limit the parameters of any assistance given with regard to the extraterritorial enforcement of a foreign sovereign's tax laws." *Id.* at 119.

In 1995, for example, the Senate ratified a treaty with Canada that provided for such assistance. *See* Revised Protocol Amending the Convention With Respect to Taxes on Income and on Capital of September 26, 1980, Mar. 17, 1995, U.S.-Canada, art. 15, S. Treaty Doc. No. 104-4 ("Revised Protocol"). Notably, this treaty provides that the United States shall give such assistance only if Canada certifies that a revenue claim has been "finally determined." *Id.* at Art. 15, ¶ 2. The Revised Protocol does not authorize the United States to assist Canada in the collection of unadjudicated tax claims, an effort that would not only embroil the United States in assisting with collection efforts, but require U.S. courts to develop expertise regarding the operation and effect of revenue laws

that are comparable in complexity to our own. In addition, the Revised Protocol states that "[n]o assistance shall be provided" with regard to Canadian revenue claims against persons who are U.S. citizens or corporations at the time that the tax liability is incurred. *Id.*, ¶ 8.

Even the sharply circumscribed level of assistance provided for in the Revised Protocol was regarded as a major step, one that was taken only after lengthy and careful consideration, and that was possible only because of the extremely close ties between the United States and Canada and the similarity of the legal and procedural protections afforded by the two states. *See R.J. Reynolds*, 268 F.3d at 121 (quoting *Treasury Technical Explanation* (discussing art. 15)). The prosecution in this case is in serious tension with this treaty both because Petitioners were U.S. citizens at all relevant times and because their tax liability, if any, to the government of Canada was never subject to a final determination or other assessment in that country.[18]

Moreover, the Extradition Treaty between the United States and Canada requires each country to deliver to the other any person who has been accused of the "[u]se of the mails or other means of communication in connection with schemes devised or intended to deceive or defraud the public or for the purpose of obtaining money or property by false pretenses." Treaty on Extradition Between the United States

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[18] As a leading tax commentator has written, tax laws "are not self-enforcing and do not themselves create a collectible liability." Michael I. Saltzman, IRS Practice and Procedure ¶ 10.01 (2003) (discussing the "fundamental importance of an assessment in the administration of the tax laws"); *see also Bull v. United States*, 295 U.S. 247, 259 (1935) (noting that under U.S. tax law, "[t]he statute prescribes the rule of taxation. Some machinery must be provided for applying the rule to the facts in each taxpayer's case, in order to ascertain the amount due. The chosen instrumentality for the purpose is an administrative agency whose action is called an assessment.").

and Canada, art. 1; annexed schedule, no. 27, TIAS 8237; 27 U.S.T. 983; 1971 U.S.T. Lexis 226 (March 22, 1976, Date-In-Force). Such provision manifests a strong intent by the political branches to handle criminal prosecutions of this nature through the treaty process, and not through unilateral action by a federal prosecutor.

In view of the careful consideration that went into negotiating and delimiting these international agreements, it seems highly incongruous to conclude, as does the Fourth Circuit, that the wire fraud statute—adopted without any apparent consideration of these issues at all—authorizes federal prosecutors to bring criminal actions against U.S. citizens for evasion of *any* revenue law promulgated by *any* foreign country, regardless of whether there is or ever could be a "finally determined" tax judgment on which to base such prosecution.

The Fourth Circuit's interpretation of the wire fraud statute in this case is also in apparent conflict with federal law regarding prosecution of the smuggling of goods into foreign countries. Congress has enacted a statute addressed specifically to this issue, and it provides that the federal government may prosecute smuggling of goods into a foreign country only if the foreign government has a reciprocal law. *See* 18 U.S.C. § 546. The statute also provides for sentences limited to a fine of not more than two years imprisonment. *See id.* By prosecuting smuggling under the wire fraud statute, the Executive circumvents both of these limitations, thus negating the Legislature's role in guiding foreign affairs. Despite the existence of Section 546, the Executive represented to the Fourth Circuit that the wire fraud statute has been made "the primary legal tool in the United States at this time" to combat smuggling from the United States into foreign countries. United States' Petition For Rehearing En Banc at 7, *United States v. Pasquantino*, 336 F.3d 321 (4th Cir. 2003) (Nos. 01-4463, 4464, 4465). This unilateral expansion of Section 1343 into an all-purpose international smuggling statute renders

Congress's enacted policy with regard to the prosecution of international smuggling a virtual dead letter.

B. Allowing the Executive to Engage in Selective Application of the Revenue Rule Has Serious Implications for the Treatment of U.S. Citizens Abroad and for the Conduct of International Business.

The revenue rule is not merely a principle of American jurisprudence, but a principle of international law, founded on an expectation of reciprocity. *See, e.g., R.J. Reynolds*, 268 F.3d at 122-23 (noting the importance of reciprocal recognition of the revenue rule to the treaty between the United States and Canada regarding extraterritorial tax collection); *Government of India v. Taylor*, [1955] A.C. 491, 508 (H.L.) ("[The revenue rule] is enforced with the knowledge that in foreign countries the same rule is observed."). Thus the issue presented in this case affects not merely whether our courts will be in the business of interpreting and applying foreign revenue law, but also whether foreign courts will be in the business of applying and interpreting U.S. revenue law. The import of the Fourth Circuit's en banc opinion in this case is that the United States will not hesitate to use a foreign country's tax laws as a basis for imposing domestic criminal sanctions where the Executive finds this to be in the interest of United States.

If this principle of selective executive application of the revenue rule becomes recognized as U.S. legal doctrine, other nations may well choose to adopt the same position. Thus foreign governments wishing to harass U.S. citizens or to interfere with U.S. business interests may take this case as a signal that they are free to criminally prosecute American citizens and businesses abroad for putative violations of U.S. tax law. This could result, for example, in Americans being tried for alleged violations of the Internal Revenue Code under procedures of foreign governments that do not comport with the procedural rules contemplated by the Internal Revenue Code, the Federal Rules of Criminal Procedure or the U.S. Constitution. Americans could face criminal sanctions in foreign countries for violations of U.S. law that would not give rise to the same sanctions here. The questions whether Congress effected such a radical change in foreign relations simply by enacting the wire fraud statute, and whether the Executive Branch may effect such a change unilaterally despite the existence of the revenue rule and enactments of Congress that bespeak a contrary policy, are important matters that this Court should address.

This case also has chilling implications for all U.S. businesses that are involved in international transactions. The result of the Fourth Circuit's holding in this case is that U.S. citizens and corporations can be prosecuted for wire fraud for scheming to avoid payment of taxes to a foreign government, regardless of whether those taxes would ever actually have accrued. *See* App. 20a ("Proof that the Defendants personally owed such taxes is not required under the wire fraud statute as long as there was proof that they participated in a fraudulent scheme to enable someone to avoid such taxes."). At the same time, defendants can be sentenced on the basis of a federal court's estimation as to how much in taxes *would have* been owed under the foreign revenue law. *See id.* 24a-26a. Under the reasoning of this case, any time a U.S. business takes an aggressive position regarding its foreign tax obligations, it conceivably risks being charged with "scheming" to deprive a foreign sovereign of tax revenue. In today's post-Enron climate of corporate skepticism, the mere possibility of such criminal liability may have a significant *in terrorem* effect that prevents U.S. companies from taking legitimate positions regarding their foreign tax liabilities.

C. The Fourth Circuit's Opinion Allows Courts to Convict and Sentence U.S. Citizens on the Basis of Mere Inferences that an Applicable Revenue Law Existed and that the Defendant Knew how it Would Be Applied.

In *Pierce*, the Second Circuit recognized that to prove a scheme to defraud a foreign sovereign of its right to be paid revenue, the prosecution must prove beyond a reasonable doubt that such a revenue law actually existed at the time of the alleged scheme. *See* 224 F.3d at 166. In the present case, the indictment alleged a scheme beginning in March 1997 and ending in April 2000. *See* App., 58a. The last wire communication alleged in the indictment took place in October of 1999. *See* App. 63a-64a. The only evidence that was offered as to the actual existence of an applicable revenue law, however, was in the form of testimony by a Canadian Customs officer. This officer testified in September 2000, nearly a full year after the last alleged wire communication that is a subject of the indictment. Her testimony is silent as to the laws existing in Canada at the time of the alleged scheme. App. 54a-56a. She was asked only to describe "what, if any, taxes or duties are due and owing on alcohol that is imported from the United States into Canada," and her testimony on this score was entirely in the present tense.[19] The Fourth Circuit acknowledged that the officer's testimony "did not specifically state that the taxes of which she was

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[19] *See* App. 55a:

> Alcohol is taxed very high in Canada. There is an excise tax, that is a federal tax, that is applied, depending on the value of it, the U.S. purchase price. There is a general sales tax that is also a federal tax. There is a Liquor Control Board of Ontario tax. And there is also a provincial sales tax."

The Canadian officer did not offer any testimony that the Canadian government had made an assessment of the amounts owed.

speaking were in force at the time of the Defendants' conduct," but nevertheless found it sufficient to support a finding of guilt. App. 19a. According to the Fourth Circuit, the "context" of the officer's testimony—in particular, her testimony that she had been assigned to investigate Petitioners—supported a finding that the laws about which she testified had been in place at the relevant time. *Id.* The existence and construction of foreign revenue law were thus treated, not as questions of law, but as questions of fact, which a jury could decide on the basis of inferences drawn from testimony and without any direct evidence of the law itself or the existence of an assessment under the law.

Even more troubling in the present case is the manner in which Petitioners' sentences were enhanced on the basis of the officer's testimony regarding the application of Canadian revenue law. The officer testified that the Canadian taxes that would be due and owing on a case of alcohol purchased in the United States for $56 would be "[s]omewhere around $100." App. 56a. Nowhere was the basis for this calculation explained. More importantly, at no time did the prosecution even attempt to establish that Petitioners had any understanding as to the actual amount of taxes they would have had to pay had the alcohol been declared at the border. Nevertheless, the court used the officer's unsubstantiated testimony as to this amount in calculating Petitioners' "intended loss" for sentencing purposes. *See* App. 24a-26a.

As the Fourth Circuit noted, "intended loss" as a basis for sentencing is entirely distinct from the "amount of loss actually possible, or likely to occur as a result of the defendant's conduct." App. 24a (citing *United States v. Miller*, 316 F.3d 495, 502 (4th Cir. 2003)). The caselaw cited by the Fourth Circuit makes clear that "intended loss" means "the pecuniary harm that was intended to result from the offense," *see Miller*, 316 F.3d at 503 (quoting U.S.S.G. § 2B1.1, cmt. n.2(A)(ii)(2001)). *See also id.* at 498 (district court did not

err "in using *the amount he intended to obtain* to compute the loss attributable to his fraud") (emphasis added). A finding of "intended loss" should therefore be based on evidence that a defendant consciously attempted to obtain or divert a particular sum or sums of money, not on the amount a revenue officer calculates after the fact and about which the defendant has no knowledge. *See, e.g., United States v. Geevers*, 226 F.3d 186, 193 (3d Cir. 2000) (basing "intended loss" on the face value of defendant's fraudulent checks).

In the case of Petitioner Hilts, the court arrived at the sum of money attributed to him as an "intended loss" by taking the number of cases of alcohol he was found to have transported in conjunction with the scheme, and multiplying it by the tax rate testified to by the Canadian officer—without any evidence that Hilts had had any knowledge what this rate was or what the actual tax would come to. Thus Hilts—who had not purchased or transported across the border any alcohol himself—was found to have "intended" a loss to Canada of $1,167,600 based solely on the inference that he was aware the cases he transported within the United States were destined to be smuggled into Canada. *See* App. 26a. How Hilts could have known, much less "intended," that Canada would be defrauded of this particular sum, however, is left unaddressed and unexplained. The Fourth Circuit's approach to this case thus not only allows the existence of an applicable revenue law to be inferred, it allows a defendant to be sentenced based on an inferred understanding as to the exact workings of that law.

Moreover, the Fourth Circuit's method of calculating "intended loss" belies the assertion that Petitioners' prosecution for wire fraud is merely a vindication of the government's interest in preventing fraudulent use of the nation's interstate wire communication systems, in which the role played by foreign revenue law is "merely incidental." *See* App. 13a-14a. The base guideline sentencing range for wire fraud is 0-6 months. The enhancements based on application of Canadian revenue law, however, resulted in sentences of 57 months for the Pasquantinos and 21 months for Hilts. *See* App. 35a-36a (Gregory, J., dissenting). As the opinion signed by the two dissenting judges remarked, "Because the bulk of the defendants' sentences were related, not to the American crime of wire fraud, but to the Canadian crime of tax evasion, I conclude that this case was primarily about enforcing Canadian law." *Id.* at 36a.[20]

D. The Fourth Circuit's Reasoning in this Case Appears to Allow Foreign Sovereigns to Bring Civil RICO Suits to Collect Tax Revenues

As discussed above, wire fraud is a predicate racketeering offense that can provide the basis for a civil damages claim under RICO. *See* 18 U.S.C. § 1961(1). Therefore, if defrauding a foreign sovereign of tax revenue constitutes wire fraud, it also constitutes racketeering activity, and a foreign sovereign harmed by a pattern of such activity should be able to bring suit in federal court to recover damages.

The Second Circuit in *R.J. Reynolds* endeavored to avoid this logical result by asserting that in a civil damages suit the actual operation of the foreign revenue law would be at issue, whereas in a criminal wire fraud prosecution only the defendants' intent to defeat that law through fraud would be relevant to establishing the offense. *See* 268 F.3d at 108-09. This distinction, faulty though it is, was possible because the Second Circuit had accepted the First Circuit's premise that the revenue rule is violated when a domestic court passes on the validity and application of a foreign revenue law. *See Trapilo*, 130 F.3d at 552-53.

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[20] Ironically however, under Canadian law any imprisonment for violation of the Excise Act is limited to a term of "not more than two years." Excise Act, R.S. c. E-12, § 108 (Can.).

The Fourth Circuit's reasoning in this case appears to leave no such escape hatch open. The en banc court rejected the First Circuit's premise completely, and took the view that passing on the validity and operation of a foreign revenue law does not violate the revenue rule so long a U.S. court is enforcing something other than a foreign tax judgment. App. 11a-12a.

Accordingly, when Canada or some other foreign sovereign brings a civil RICO suit in the Fourth Circuit similar to the one Canada attempted to bring in *R.J. Reynolds*, the logic of the present case suggests that it will go forward. Unlike the Second Circuit, the Fourth Circuit is willing to apply foreign revenue law to calculate damages—it has already done so to calculate "intended loss." So long as the U.S. government has its own interest in prosecuting, the case may go forward. This is not reasoning that is capable of distinguishing a foreign government's RICO claim. Just as the United States has a "substantial interest in preventing our nation's interstate wire communication systems from being used in furtherance of criminal fraudulent enterprises," App. 13a-14a, so it also has substantial interests in preventing the channels of interstate commerce from being used to conduct racketeering enterprises, and in compensating the victims of such enterprises for the losses they sustain. If the Fourth Circuit applies its logic consistently, it will find to be "merely incidental" the fact that the losses in question would consist entirely of accrued but unpaid taxes owed under the foreign sovereign's revenue laws, and will allow such claims to proceed. *Id.*. The courts of this country should not become the world's tax courts, either though use of RICO or through criminal enforcement.[21]

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[21] *See* NAM Amicus Brief at 22 (warning against the danger of "transforming U.S. federal courts into the world's tax courts").

Only this Court can ensure that a consistent rule of law applies throughout the United States on these important questions of national law and international affairs.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 15, 2003

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 01-4463, 01-4464, 01-4465

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID B. PASQUANTINO,
Defendant-Appellant,

v.

CARL J. PASQUANTINO,
Defendant-Appellant,

v.

ARTHUR HILTS, A/K/A BUTCH,
Defendant-Appellant.

July 18, 2003.

OPINION

Before WILKINS, *Chief Judge*, WIDENER, WILKINSON, NIEMEYER, WILLIAMS, MICHAEL, TRAXLER, KING, GREGORY, and SHEDD, *Circuit Judges*, and HAMILTON, *Senior Circuit Judge*.

HAMILTON, *Senior Circuit Judge*:

David Pasquantino, Carl Pasquantino, and Arthur Hilts (collectively the Defendants) were convicted of using interstate wires for the purpose of executing a scheme to defraud Canada and the Province of Ontario of excise duties

and tax revenues relating to the importation and sale of liquor. According to the Defendants, their convictions and sentences cannot stand because, *inter alia*, application of the common law revenue rule precludes prosecution under the federal wire fraud statute, 18 U.S.C. § 1343, for use of interstate wires for the purpose of executing a scheme to defraud a foreign sovereign of its property rights in accrued tax revenue. Sitting *en banc*, we reject this argument and hold that the common law revenue rule does not preclude prosecution under the wire fraud statute for use of interstate wires for the purpose of executing a scheme to defraud a foreign sovereign of its property rights in accrued tax revenue. We also reject the Defendants' other arguments in challenge of their convictions and Hilts' challenge to his sentence. Accordingly, we affirm.

I.

Viewed in the light most favorable to the government, the evidence at trial revealed a substantial liquor smuggling operation beginning in 1996 and continuing through May 2000. No doubt this smuggling operation was spawned to supply a black market for liquor in Canada that had been created when, some years ago, Canada increased the sin taxes on liquor to such a level that Canadian taxes significantly exceeded comparable United States taxes.

Brothers David and Carl Pasquantino, residents of Niagara Falls, New York, devised and headed the smuggling operation, which constituted a scheme to defraud Canada and the Province of Ontario of excise duties and tax revenues relating to the importation and sale of liquor in Canada. The scheme to defraud generally operated as follows: (1) while in New York, Carl or David Pasquantino would place a large order for low-end liquor by telephone with a discount liquor store in Maryland; (2) a driver such as Arthur Hilts used a rented truck to pick up the liquor from the discount liquor store in Maryland and transport it to New York for storage;

and (3) a driver smuggled a lesser quantity of the liquor across the Canadian border in the trunk of a vehicle.

After agents from the United States Bureau of Alcohol, Tobacco, and Firearms (ATF agents) discovered that eight discount retail liquor stores in Maryland had purchased unusually large quantities of low-end liquor from wholesalers, a criminal investigation ensued. Two of the store owners cooperated proactively with ATF agents by recording telephone conversations and advising the agents of calls and visits by the Defendants.[1] Moreover, ATF agents obtained numerous telephone, truck rental, and motel records, all of which evidenced the scheme. Border crossings were monitored electronically, tracking license plates of vehicles entering Canada. Several vehicles that were registered to drivers involved in the scheme failed to stop for a second inspection when requested. ATF agents and Royal Canadian Mounted Police also conducted surveillance of David and Carl Pasquantino and their associates loading liquor in Maryland and unloading it in Canada after it was smuggled through Canadian customs. Marked bottles of liquor were recovered in Canada.

Subsequently, the Defendants were indicted, along with four other individuals, on six counts of wire fraud and aiding and abetting wire fraud, in violation of 18 U.S.C. §§ 2 and 1343.[2] The Defendants filed a pretrial motion to dismiss the

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[1] In exchange for their cooperation, the store owners were not prosecuted for violations of United States Department of Treasury Regulations which required that they record and report bulk sales of alcohol.

[2] At the time of the offenses charged in the indictment, the wire fraud statute provided, in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire . . . communication in

indictment on the ground that the common law revenue rule barred their prosecution under the federal wire fraud statute. Alternatively, the Defendants grounded their dismissal motion on the basis that accrued tax revenue does not constitute property under the federal wire fraud statute. Following the district court's denial of the motion, the case proceeded to trial before a jury.

At trial, the eight Maryland liquor store owners testified for the government regarding their dealings with the Pasquantinos. Three identified Hilts as one of the drivers who picked up large orders of liquor for the Pasquantinos. In addition to the store owners, two men who had been involved in the scheme testified that they transported liquor for David and Carl Pasquantino from the United States into Canada, and that the Pasquantinos paid them cash for each run. Canadian Customs Intelligence Officer Gina Jonah (Officer Jonah) testified that there is a Canadian federal excise tax and general sales tax, as well as a Liquor Control Board of Ontario tax and a provincial sales tax on liquor imported from the United States into Canada. Officer Jonah, a seventeen-year veteran employee of Canadian Customs, explained that the equivalent of approximately one-hundred American dollars would be due and owing on a case of liquor that was purchased in the United States for fifty-six American dollars and imported into Canada. She stated that generally the amount of Canadian tax due is twice the purchase price of the case of liquor in the United States.

David and Carl Pasquantino were convicted on all six counts of the indictment and sentenced to fifty-seven months'

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interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1343 (2000).

imprisonment on each count, to be served concurrently. Before the case was submitted to the jury, the district court dismissed all but Count I against Arthur Hilts. Hilts was convicted on that count and sentenced to twenty-one months' imprisonment. This timely appeal followed.

The Defendants' convictions were subsequently vacated by a two-to-one panel decision. *United States v. Pasquantino*, 305 F.3d 291 (4th Cir. 2002), *vacated and reh'g en banc granted*, (4th Cir. 2003). Upon the government's suggestion, a majority of full-time, active circuit judges voted to rehear the case *en banc*.

II.

The Defendants' primary argument is that the district court erred in denying their motion to dismiss because the common law revenue rule precludes their prosecution on federal wire fraud charges. The Defendants' argument presents an issue of first impression in the Fourth Circuit. To be clear, the issue is whether application of the common law revenue rule puts beyond the reach of the federal wire fraud statute, 18 U.S.C. § 1343, the use of interstate wires for the purpose of executing a scheme to defraud a foreign sovereign of its property rights in accrued tax revenue.

We begin our analysis of this issue by recognizing that its resolution depends in large measure upon determining the proper formulation of the common law revenue rule in American jurisprudence. Assuming *arguendo* that a government's right to accrued tax revenue constitutes property for purposes of the wire fraud statute (an issue we address in Part III of this opinion), the wire fraud statute, on its face, criminalizes the Defendants' conduct of engaging in a scheme to defraud Canada and the Province of Ontario of tax revenue. Under relevant Supreme Court precedent, the only circumstance under which we may hold that this conduct is beyond the reach of the wire fraud statute is if, at the time

Congress enacted the wire fraud statute in July 1952, well established common law provided that the courts of one sovereign were prohibited from recognizing the existence of the revenue laws of a foreign sovereign. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991) ("where a common-law principle is well established ... the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident") (internal quotation marks and citations omitted). Without the existence of such well-established common law, our setting aside of the Defendants' convictions and sentences as posited by the Defendants would be *ultra vires*. *Id.* ("Courts do not, of course, have free rein to impose [common law] rules of preclusion, as a matter of policy, when the interpretation of a statute is at hand.").

A logical starting point in determining the proper formulation of the common law revenue rule in American jurisprudence is the Restatement (Third) of Foreign Relations Law of the United States (1987) (hereinafter "the Restatement"), which courts often rely upon as an authoritative exposition of the foreign relations law of the United States. *See, e.g., C & L Enters. Inc. v. Citizen Band Potawatomi Indian Tribe of OK*, 532 U.S. 411, 421 n. 3, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993); *United States v. Boots*, 80 F.3d 580, 587 (1st Cir. 1996); *Palma v. Verdeyen*, 676 F.2d 100, 106 n. 5 (4th Cir. 1982). Section 483 of the Restatement provides the following formulation of the common law revenue rule: "Courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other states." The Restatement § 483.

The formulation of the common law revenue rule found in most case law is nearly identical to that of the Restatement. For example, in *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001), *cert. denied*, ___ U.S. ___, 123 S.Ct. 513, 154 L.Ed.2d 394 (2002), the Second Circuit described the common law revenue rule as "a longstanding common law doctrine providing that courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns." *Id.* at 109. Similarly, the First Circuit, in *Boots*, stated that the common law revenue rule "holds that courts generally will not enforce foreign tax judgments ...." *Boots*, 80 F.3d at 587 (citing the Restatement § 483 as authority). The Ninth Circuit, in *Her Majesty the Queen ex rel. B.C. v. Gilbertson*, 597 F.2d 1161 (9th Cir. 1979), the first federal case ever to invoke the common law revenue rule in the international context, described the common law revenue rule as an exception to the general rule that judgments from a foreign country are recognized by the courts of this country when the general principles of comity are satisfied. *Id.* at 1163. And although the Supreme Court has never passed upon the precise scope of the common law revenue rule, in 1964, it noted that many courts in the United States have adhered to the principle that "a court need not give effect to the penal or revenue laws of foreign countries." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 413, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964).

Some rationales commonly given for the formulation of the common law revenue rule as found in the Restatement and the case law in accord are: (1) the reluctance of courts to subject foreign public law to potentially embarrassing judicial scrutiny, *see, e.g., Her Majesty the Queen ex rel. B.C.*, 597 F.2d at 1164-65; (2) the courts of one nation have no obligation to further the governmental interests of a foreign nation, *see, e.g., Sabbatino*, 376 U.S. at 448, 84 S.Ct. 923 (White, J., dissenting on other grounds); and (3) the noninterference by the judicial branch in matters of foreign

policy which fall within the exclusive province of the executive and legislative branches of our federal government, *see, e.g., Attorney Gen. of Canada*, 268 F.3d at 114.

The Defendants discount the Restatement's formulation of the common law revenue rule and that of the case law in accord as too narrow and merely evincing the typical application of the rule. The actual rule, they claim, is much broader and provides that no nation, under any circumstances, shall ever recognize the tax laws of a foreign sovereign. The Defendants then argue that because their convictions on the wire fraud charges in this case would necessarily require an American court to recognize certain revenue laws of Canada and the Province of Ontario, the common law revenue rule precludes their prosecution. Thus, as applied in the present case, the Defendants view the common law revenue rule as an absolute prohibition on American courts from recognizing a revenue law of a foreign sovereign in any context.

The Defendants cite the separation of powers rationale and the avoid embarrassment rationale as the two rationales for their version of the common law revenue rule. Additionally, they posit that application (of their version) of the common law revenue rule to vacate their wire fraud convictions and sentences serves both of these rationales.

In support of their broad formulation of the common law revenue rule, the Defendants rely on *dicta* in two eighteenth-century, British contract cases written by Lord Mansfield. The first case is *Holman v. Johnson*, 98 Eng. Rep. 1120 (K.B. 1775). The subject of the contract in *Holman* was the sale of tea in France, which tea the parties knew was to be smuggled into England to avoid English customs duties. The French seller sued the English buyer in England to recover the purchase price. *Id.* The English buyer argued in defense that the contract was void for an illegal purpose. *Id.*

Lord Mansfield first determined the conflict of laws issue in that case as follows:

> There can be no doubt, but that every action tried here must be tried by the law of England; but the law of England says, that in a variety of circumstances, with regard to contracts legally made abroad, the laws of the country where the cause of action arose shall govern. There are a great many cases which every country says shall be determined by the laws of foreign countries where they arise. But I do not see how the principles on which that doctrine obtains are applicable to the present case. *For no country ever takes notice of the revenue laws of another.*

Id. at 1121 (emphasis added). Lord Mansfield then discussed whether the French seller had engaged in an illegal act:

> This is an action brought merely for goods sold and delivered at Dunkirk[, France]. Where then, or in what respect is the plaintiff guilty of any crime? Is there any law of England transgressed by a person making a complete sale of a parcel of goods at Dunkirk, and giving credit for them? The contract is complete, and nothing is left to be done.

Id. Clearly, Lord Mansfield's statement concerning whether a country would recognize the revenue laws of a foreign sovereign was not made in the context of his decision on the merits of the case, but on the choice of law issue. Indeed, in the words of one legal commentator, such statement "was not directed to the merits of the case; it was not necessary to decide the case, and was therefore dictum." William J. Kovatch, Jr., *Recognizing Foreign Tax Judgments: An argument for the revocation of the revenue rule*, 22 Hous. J. Int'l L. 265, 276 (2000). *See Her Majesty the Queen ex rel. B.C.*, 597 F.2d at 1164 (characterizing as *dictum* Lord Mansfield's

statement in *Holman* regarding whether a country would recognize the revenue laws of a foreign sovereign).

The second case upon which the Defendants rely is *Planche v. Fletcher*, 99 Eng. Rep. 164 (1779). The plaintiff in *Planche* obtained insurance for cargo aboard a ship in England ultimately bound for France. *Id.* Following destruction of the cargo, the plaintiff sued the insurance company for payment and won. *Id.*

On appeal, the insurance company challenged the verdict on the ground that the plaintiff had fraudulently obtained the insurance policy by declaring a false shipping route in order to avoid paying higher French duties on goods imported from England as compared to goods imported from Belgium. Lord Mansfield held that no fraud existed because "[w]hat had been practiced in this case was proved to be constant course of trade, and notoriously so to every body." *Id.* at 165. After eschewing the existence of any fraud on the part of the plaintiff, Lord Mansfield added in dictum: "But, at any rate, this was no fraud in this country. One nation does not take notice of the revenue laws of another." *Id. See Her Majesty the Queen ex rel. B.C.*, 597 F.2d at 1164 (characterizing as *dictum* Lord Mansfield's statement in *Planche* regarding whether a country would recognize the revenue laws of a foreign sovereign).

The Defendants have two significant problems with relying on *Holman* and *Planche* as authority for defining the common law revenue rule as a prohibition on the courts of one nation from recognizing the revenue laws of a foreign sovereign in any context. The first significant problem is that the statements they rely upon in the two cases are pure and simple dicta, and, therefore, cannot serve as a source of binding authority in American jurisprudence. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 282, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001) ("[T]his Court is bound by holdings,

not language."); *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 379, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994) ("It is to the holdings of our cases, rather than their dicta, that we must attend . . . ."); *United States v. Dixon*, 509 U.S. 688, 706, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993) (quoting *United States Nat. Bank of Or. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 463, n. 11, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993), on "'the need to distinguish an opinion's holding from its dicta' "). The second significant problem is that the two rationales that the Defendants cite in support of their expansive version of the common law revenue rule are not even traceable to *Holman* and *Planche*. Rather, the statements by Lord Mansfield in those cases upon which the Defendants rely have as their sole rationale the protection of British trade from the oppressiveness of high foreign customs duties. *See Attorney Gen. of Canada*, 268 F.3d at 110; William S. Dodge, *Breaking the Public Law Taboo*, 43 Harv. Int'l L.J. 161, 170 (2002).

In short, *Holman* and *Planche* are inadequate authority for the proposition that, at the time Congress enacted the wire fraud statute in 1952, it was well-established at common law that the courts of one nation could never recognize the revenue laws of a foreign sovereign. Indeed, all persuasive authority supports the position that the Restatement's formulation of the common law revenue rule and that of the case law in accord reflects the formulation of the common law revenue rule in existence at the time that Congress enacted the wire fraud statute in 1952. Critically, such formulation speaks in permissive not mandatory terms and pertains to the nonenforcement of foreign tax judgments as opposed to the nonrecognition of foreign revenue laws.[3]

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[3] The dissent relies on this sentence to charge that rather than applying the Restatement's formulation of the common law revenue rule as stated, we have "narrow[ed] its application only to those rare instances in which a court is compelled to actually enforce the judgment of a foreign court."

Under these circumstances, we cannot presume that when Congress enacted the wire fraud statute in 1952, it did so with the intent that any prosecution thereunder could not involve recognition or observance of the revenue laws of a foreign sovereign. *Astoria Fed. Sav. & Loan Ass'n*, 501 U.S. at 108, 111 S.Ct. 2166. Without such a presumption, we have no basis upon which to ignore the plain language of the wire fraud statute, which language (assuming *arguendo* that a sovereign's right to tax revenue constitutes property for purposes of the wire fraud statute) squarely encompasses the Defendants' conduct.

The Defendants make a related alternative argument that even application of the Restatement version of the common law revenue rule requires that we vacate their convictions and sentences under the wire fraud statute, asserting that our affirmance of their convictions and sentences would be the functional equivalent of enforcing the revenue laws of Canada and the Province of Ontario.

We candidly acknowledge that the Defendants' argument is not without support. In *Boots*, the defendants had been convicted of wire fraud for their participation in a scheme, using interstate wires, to defraud Canada and the Province of Nova Scotia of excise duties and tax revenues due on imported tobacco. *Boots*, 80 F.3d at 583. The First Circuit vacated the convictions in large measure on the basis that

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Post at 338. The dissent completely misreads the sentence, which expressly recognizes that the Restatement's formulation of the common law revenue rule "speaks in permissive not mandatory terms." Further-more, the dissent's charge misses the critical distinction between the nonenforcement (or nonrecognition) of *foreign tax judgments*, as is addressed in the Restatement's formulation of the common law revenue rule, with the nonenforcement (or nonrecognition) of *foreign revenue laws*, which is not at all addressed in that formulation. The distinction is critical because prosecution of the Defendants depended neither upon the enforcement nor recognition of a foreign tax judgment.

"upholding defendants' section 1343 conviction[s] would amount functionally to penal enforcement of Canadian customs and tax laws" in violation of the common law revenue rule. *Id.* at 587. The First Circuit reached this conclusion on the basis that conviction of the defendants effectively required it and the district court to pass upon the validity and operation of a foreign sovereign's revenue laws, thus implicating the important concerns underlying the common law revenue rule.[4] *Id.* According to the First Circuit, national policy judgments of the legislative and executive branches in the area of foreign policy could be undermined, and the revenue laws of a foreign sovereign subjected to intrusive scrutiny, were federal courts to uphold prosecutions of wire fraud schemes aimed at violating the revenue laws of a foreign sovereign. *Id.* at 587-88.

We reject the Defendants' argument that affirmance of their convictions and sentences for wire fraud would be the functional equivalent of enforcing the revenue laws of Canada and the Province of Ontario, and thus in violation of the common law revenue rule. In making this argument, the Defendants, and the First Circuit in *Boots* for that matter, miss the critical point that prosecution for violation of the federal wire fraud statute, even when the subject of the wire fraud scheme involved is certain tax revenue due a foreign sovereign, does nothing civilly or criminally to enforce any tax judgments or claims that the foreign sovereign has or may later obtain against the defendant. Neither does such prosecution enforce the revenue laws of the foreign sovereign involved. Rather, such prosecution seeks only to enforce the federal wire fraud statute for the singular goal of vindicating our government's substantial interest in preventing our nation's interstate wire communication systems from being

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[4] Notably, the *Boots* court relied upon the Restatement as authority for defining the common law revenue rule as follows: [C]ourts generally will not enforce foreign tax judgments . . . . *Boots*, 80 F.3d at 587.

used in furtherance of criminal fraudulent enterprises. Thus, the fact that the property at issue in the Defendants' wire fraud scheme belonged to foreign governments by virtue of those governments' respective revenue laws is merely incidental to prosecution under the federal wire fraud statute.

Moreover, affirming the Defendants' wire fraud convictions and sentences in this case presents no separation of powers problems, the only rationale of the common law revenue rule with jurisdictional underpinnings. Congress enacted the wire fraud statute and the United States Attorney, acting on behalf of the United States as directed by the Executive Branch, made the decision to seek the Defendants' indictment thereunder. Thus, to the extent matters of foreign policy were implicated by prosecution of the Defendants on the wire fraud charges in this case, such matters were passed upon by the only two branches of our federal government charged by our Constitution with the power to make foreign policy decisions. *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111, 68 S.Ct. 431, 92 L.Ed. 568 (1948) (declaring that decisions as to foreign policy "are wholly confided by our Constitution to the political departments of the government, Executive and Legislative"). However, we have no doubt that a significant separation of powers problem would arise were we to play diplomat from the bench by relying on a novel expansion of the common law revenue rule, no doubt a policy laden rule, to set aside the Defendants' wire fraud convictions and sentences.

We find strong support for our rejection of the Defendants' arguments involving the common law revenue rule in *United States v. Trapilo*, 130 F.3d 547 (2d Cir.1997). In that case, the Second Circuit considered whether a scheme (essentially identical to the one before us) to defraud Canada of tax revenue is cognizable under the federal wire fraud statute, 18 U.S.C. § 1343. *Trapilo*, 130 F.3d at 548. The Second Circuit held that "[t]he statute neither expressly, nor impliedly,

precludes the prosecution of a scheme to defraud a foreign government of tax revenue, and the common law revenue rule, inapplicable to the instant case, provides no justification for departing from the plain meaning of the statute." *Id.* at 551.

In sum, we hold the district court did not err in denying the Defendants' motion to dismiss the indictment, which motion the Defendants premised upon their argument that the common law revenue rule precludes their prosecution for wire fraud.

III.

The Defendants next argue that under the Supreme Court's decision in *Cleveland v. United States*, 531 U.S. 12, 121 S.Ct. 365, 148 L.Ed.2d 221 (2000), a government's right to collect accrued tax revenue is not a property right for purposes of the wire fraud statute. In this regard, the Defendants rely on the following language from *Cleveland*: "It does not suffice, we clarify, that the object of the fraud may become property in the recipient's hands; for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim." *Cleveland*, 531 U.S. at 15, 121 S.Ct. 365.

The Defendants' reliance on this language in Cleveland is completely misplaced. The defendant in *Cleveland* was prosecuted under the mail fraud statute (sister of the wire fraud statute), 18 U.S.C. § 1341, for making false statements in applying to the Louisiana State Police for a license to operate video poker machines.[5] The Supreme Court held that permits or licenses of this order do not qualify as "property" for purposes of the mail fraud statute. *Id.* at 16, 26-27, 121 S.Ct. 365. The Court reached this holding on the bases that

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[5] Because the mail and wire fraud statutes share the same language in relevant part, we apply the same analysis to both offenses. *Carpenter v. United States*, 484 U.S. 19, 25 n. 6, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987).

the property at issue had to be property that was valuable in the hands of the victim, not just valuable in the hands of the defendant, and that an unissued video poker license did not constitute property that was valuable in the hands of the State of Louisiana.[6] *Id.* at 22-27, 121 S.Ct. 365.

In contrast to the facts in *Cleveland*, because a government has a property right in tax revenues when they accrue, *see Manning v. Seeley Tube & Box Co.*, 338 U.S. 561, 566, 70 S.Ct. 386, 94 L.Ed. 346 (1950), the tax revenues owed Canada and the Province of Ontario by reason of the Defendants' conduct in the present case constitute property for purposes of the wire fraud statute. *United States v. Brewer*, 528 F.2d 492, 495 (4th Cir. 1975) (holding that plain language of the mail fraud statute "condemns any scheme to defraud in which the mails are employed, *including the evasion of sales and use taxes*") (emphasis added). Indeed, the Court in *Cleveland* conspicuously pointed out that the government in that case had "nowhere allege[d] that Cleveland defrauded the State of any money to which the State was entitled by law." *Cleveland*, 531 U.S. at 22, 121 S.Ct. 365. In sum, we hold that Canada and the Province of Ontario's right to accrued tax revenue constitutes a sufficient property right for wire fraud purposes, unaffected by the Court's decision in *Cleveland*.

IV.

The Defendants make several challenges to the sufficiency of the evidence in support of their convictions. We review the sufficiency of the evidence to support a conviction by determining whether there is substantial evidence in the record, when viewed in the light most favorable to the government, to support the conviction. *United States v.*

[6] Indeed, a great deal of the Court's opinion is devoted to a discussion of why an unissued video poker license is of no monetary value to the State of Louisiana. *Cleveland*, 531 U.S. at 20-25, 121 S.Ct. 365.

Burgos, 94 F.3d 849, 860 (4th Cir. 1996) (*en banc*). In determining whether the evidence in the record is substantial, we examine whether there "is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *Id.* at 862. We are also mindful that our reversal of a conviction on grounds of insufficient evidence is " 'confined to cases where the prosecution's failure is clear.'" *United States v. Jones*, 735 F.2d 785, 791 (4th Cir. 1984) (quoting *Burks v. United States*, 437 U.S. 1, 17, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978)).

Wire fraud is established through the existence of a scheme to defraud and the use of interstate wires in furtherance of that scheme. *United States v. Bollin*, 264 F.3d 391, 407 (4th Cir. 2001), *cert. denied*, 534 U.S. 935, 122 S.Ct. 303, 151 L.Ed.2d 225 (2001) and 535 U.S. 989, 122 S.Ct. 1544, 152 L.Ed.2d 469 (2002). The scheme or artifice to defraud can be in the form of an assertion of a material falsehood with the intent to deceive or active concealment of a material fact with the intent to deceive. *United States v. Colton*, 231 F.3d 890, 899-901 (4th Cir. 2000). A fact is material if it has a natural tendency to influence or is capable of influencing the intended victim. *Neder v. United States*, 527 U.S. 1, 22, 24, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). *Cf. United States v. Gaudin*, 515 U.S. 506, 509, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); *Kungys v. United States*, 485 U.S. 759, 770, 108 S.Ct. 1537, 99 L.Ed.2d 839 (1988).

A. *Materiality.*

The Defendants contend that, assuming *arguendo* they had engaged in a scheme to defraud Canada and the Province of Ontario of excise duties and tax revenues by virtue of a liquor smuggling operation, the evidence was insufficient to establish that such scheme depended upon a material falsehood or active concealment of a material fact. We disagree. Reasonable inferences from the evidence at trial establish that

the Defendants' scheme depended in large measure upon their purposeful routine failure to declare their possession of imported liquor when asked to declare any "goods that [they had] entering Canada" by a Canadian Customs Officer in the Primary Inspection Line at the United States/Canadian border. (J.A. 179). We have no doubt that such failure to declare was capable of influencing Canadian Customs Officers to allow vehicles containing concealed liquor to proceed on into Canada without further inspection by Canadian Customs Officials for the purpose of identifying goods subject to excise duties and taxes. Accordingly, we hold the evidence was sufficient to establish their active concealment of a material fact with intent to deceive. *Cf. Brewer*, 528 F.2d at 496 (defendant's scheme to sell cigarettes into another state through the mail without registering with tax officials in that state, as required by the Jenkins Act, in order that purchasers in that state could avoid paying sales taxes on the cigarettes constitutes mail fraud).

B. *Existence of Tax Laws.*

Next, the Defendants contest the sufficiency of the evidence to establish that liquor imported into Canada and the Province of Ontario is subject to excise duties and other taxes. The Defendants argue that without such evidence the government failed to show that the wire fraud scheme charged in this case sought to deprive Canada or the Province of Ontario of any property interest. In a similar vein, the Defendants also argue that the evidence was insufficient to prove that they personally owed Canada or the Province of Ontario any taxes in connection with the liquor that they are alleged to have smuggled.

We reject these arguments. First, we hold that the evidence was sufficient to prove beyond a reasonable doubt that liquor imported into Canada and the Province of Ontario was subject to excise duties and other applicable taxes at the time

of the Defendants' conduct as charged in this case. The evidence is in the form of trial testimony by Officer Jonah. Based upon her seventeen years of employment experience with Canadian Customs, Officer Jonah testified that she was familiar with the rules and regulations that pertain to the importation of alcoholic beverages into Canada. Then, in answer to government counsel's request that she describe for the court and the jury what, if any, taxes or duties are due and owing on alcohol that is imported from the United States into Canada, Officer Jonah testified as follows:

> Alcohol is taxed very high in Canada. There is an excise tax, that is a federal tax, that is applied, depending on the value of it, the U.S. purchase price. There is a general sales tax that is also a federal tax. There is a Liquor Control Board of Ontario tax. And there also is a provincial sales tax.

(J.A. 177). Officer Jonah further testified that, in preparation for her testimony, she calculated that the Canadian and Province of Ontario taxes that would be due and owing on a case of imported alcohol that was purchased in the United States for fifty-six American dollars would be approximately one hundred American dollars, which converts to approximately 157 Canadian dollars.

Even though Officer Jonah did not specifically state that the taxes of which she was speaking were in force at the time of the Defendants' conduct as charged in this case, the context of her entire testimony permitted the jury to draw this reasonable inference. For example, Officer Jonah was assigned to investigate the Defendants on suspicion of liquor smuggling based upon their conduct as charged in this case. In sum, we have no reservations that the evidence at trial was sufficient to prove beyond a reasonable doubt that liquor imported into Canada and the Province of Ontario was subject to excise duties and other applicable taxes at the time of the Defendants' conduct as charged in this case.

Second, the Defendants' challenge to the sufficiency of the evidence establishing that they personally owed Canada or the Province of Ontario any taxes in connection with the liquor that they are alleged to have smuggled completely misses the mark. Proof that the Defendants personally owed such taxes is not required under the wire fraud statute as long as there was proof that they participated in a fraudulent scheme to enable someone to avoid such taxes. *Cf. Brewer*, 528 F.2d at 496 (where defendant knowingly devised mail fraud scheme to enable Florida residents to obtain cigarettes without declaring them for taxation, it was no defense to mail fraud prosecution that defendant herself owed no tax). The testimony of Officer Jonah that we just discussed serves as such proof in this case. Indeed, from the testimony of Officer Jonah and the overall context in which it was given in relation to the joint United States and Canadian investigation which led to this prosecution, it was a reasonable inference that the Canadian taxes were due by the importer upon importation of liquor into Canada. The jury found and at trial the Defendants never challenged the proposition that such taxes were due by the importer. Nonetheless, as we recognized in *Brewer*, the defendant could not avoid prosecution under the federal mail fraud statute on the ground that she herself owed no taxes on the cigarettes she smuggled into Florida from North Carolina. *Id.* The quintessential element is that the scheme in the present case involved defrauding the Canadian authorities of revenue taxes on imported liquor regardless of what party had responsibility for the payment of those taxes. The precise time when the taxes are owed and whom they are due from are not elements of the offense. What is required is proof that such taxes were due and the conduct involved a scheme to defraud the Canadian authorities of the taxes.

C. *Hilts' Participation.*

Finally, we address Hilts' specific challenge to the sufficiency of the evidence to support his conviction on Count I.

Count I charged the substantive crime of wire fraud, 18 U.S.C. § 1343, and the adjunct crime of aiding and abetting wire fraud, 18 U.S.C. § 2.[7] Pursuant to 18 U.S.C. § 2, one who aids or abets the commission of an offense "is punishable as a principal." We have held that "[a] defendant is guilty of aiding and abetting if he has knowingly associated himself with and participated in the criminal venture." *United States v. Burgos*, 94 F.3d 849, 873 (4th Cir.1996) (*en banc*) (internal quotation marks omitted). Significantly, in order "to be convicted of aiding and abetting, participation in every stage of an illegal venture is not required, only participation at some stage accompanied by knowledge of the

[7] As a housekeeping matter, we note that although the written judgment for Hilts specifies that he was convicted of Count I of the indictment, it does not specify the statutory section for aiding and abetting, nor does it describe the nature of the offense with respect to Count I as aiding and abetting. Rather, it only specifies the statutory section for wire fraud and describes the nature of the offense with respect to Count I as "WIRE FRAUD." (J.A. 351). Given that Count I of the indictment charged Hilts with aiding and abetting wire fraud along with the substantive offense of wire fraud, the district court instructed the jury on aiding and abetting with respect to Count I, Hilts' counsel discussed the aiding and abetting aspect of Count I in his closing argument before the jury, and the jury returned an unequivocal oral verdict finding Hilts guilty of Count I, we have no doubt that the failure of the written judgment to specifically reflect the aiding and abetting aspect of Count I was a clerical error. However, such detail need not concern us further in this appeal. The written judgment's explicit reference to Count I of the indictment sufficiently incorporates 18 U.S.C. § 2 for our purposes. *See United States v. Allen*, 675 F.2d 1373, 1385 (9th Cir. 1980) (although Count III of indictment charged defendant with aiding and abetting while written judgment of Count III only specifically cited the substantive offense, the written judgment's provision that the defendant was convicted of Count III "*as charged in Count 3 of the indictment*," was sufficient to incorporate 18 U.S.C. § 2). We do point out, however, that pursuant to Federal Rule of Criminal Procedure 36, the district court has the authority to correct the mistake. Fed. R. Crim. P. 36 (After giving any notice it considers appropriate, the court may at any time correct a clerical error in a judgment . . . arising from oversight or omission).

result and intent to bring about the result." *Id.* (internal quotation marks and alteration marks omitted). Of particular relevance here, to be convicted of aiding and abetting a wire fraud offense, it is not necessary for the defendant to be directly or personally involved in the wire communication as long as the wire communication was reasonably foreseeable to the defendant in the execution of the alleged scheme to defraud in which the defendant is accused of participating. *United States v. Griffith*, 17 F.3d 865, 874 (6th Cir. 1994).

The specific interstate communication charged as the basis for Count I was a telephone call from David Pasquantino in Niagara Falls, New York, to Valley Wine and Spirits in Hagerstown, Maryland, on March 9, 1999. David's brother Carl was also charged as a participant in the wire fraud scheme set forth in Count I. According to the indictment, the wire fraud scheme to defraud Canada and the Province of Ontario of excise duties and other taxes as charged in Count I began in or about March 1997 and lasted until the date of indictment, April 13, 2000.

Hilts primarily challenges the sufficiency of the evidence to establish that he knowingly and willfully participated in the wire fraud scheme charged in Count I with knowledge of its fraudulent nature. He claims that his conduct in picking up the large loads of liquor from the various discount liquor stores in Maryland was completely innocent, and points out that there is no evidence that he ever picked up any liquor from Valley Wine and Spirits nor any evidence linking him to the telephone call charged as the basis for Count I.

The government's theory at trial was that Hilts participated in the wire fraud scheme charged in Count I as a pick up and delivery driver with knowledge that the liquor he was handling would ultimately be smuggled into Canada without paying Canada or the Province of Ontario the applicable taxes. We hold the evidence in the record is sufficient to sustain Hilts' conviction on Count I. Viewed in the light most favorable to the government, the evidence in the record shows that, between February 27, 1997 and April 22, 1998, Hilts rented a Ryder truck in Niagara Falls, New York, from the same business (Gaines Sunoco), on average every two weeks; traveled in the truck between 738 and 978 miles (usually around 815 miles); and returned the truck the very next day. Hilts resumed almost the identical pattern of behavior in November 1998 and continued it until April 28, 1999, when, after detecting that he was under surveillance by ATF agents from the time he had left BJ's liquor store in Maryland until he had arrived in upstate New York, Hilts abandoned the Ryder truck that he had rented the day before on the side of the road. At the time that Hilts abandoned the truck, it contained 222 cases of liquor. Prior to abandoning the truck, Hilts successfully made several evasive driving maneuvers in order to escape the surveillance.

The record also shows that during these same time periods, Hilts used the rented trucks to pick up large bulk orders of liquor from two different Maryland liquor stores (neither of them Valley Wine and Spirits) for Carl Pasquantino.[8] The record also shows that from September 23, 1998 to April 9, 1999, a vehicle registered to Hilts made thirty-nine trips from Niagara Falls, New York across the Rainbow Bridge into the Canadian Province of Ontario. However, such trips ceased completely after Hilts abandoned the Ryder rental truck on April 28, 1999.

Viewing the evidence just recited in the light most favorable to the government, we hold that a reasonable finder of fact could accept such evidence as adequate and sufficient to support a conclusion beyond a reasonable doubt that Hilts

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[8] One of the store owners (*i.e.*, the owner of BJ's Liquors) testified that Hilts always picked up the large bulk sale orders placed by Carl Pasquantino in a Ryder rental truck and that the first several times Hilts arrived at his store, Hilts already had cases of the same type of liquor on the truck.

knowingly participated at various stages in the wire fraud scheme charged in Count I with knowledge that the liquor he was transporting would ultimately be smuggled into Canada without paying Canada or the Province of Ontario the applicable taxes due on such liquor. The fact that Hilts abandoned the liquor laden rental truck after detecting surveillance by ATF agents during a liquor run from Maryland to New York is strong evidence of his criminal intent. The same goes for his evasive driving maneuvers and the fact that his own vehicle did not cross the Rainbow Bridge after April 28, 1999. Furthermore, the mere fact that Hilts did not personally make the telephone call that is specifically alleged in Count I is of no import. The evidence supports a reasonable inference that the March 9, 1999 telephone call by David Pasquantino to Valley Wine & Spirits was reasonably foreseeable to Hilts in the execution of the fraudulent scheme alleged in Count I. *Griffith*, 17 F.3d at 874.

V.

Finally, we address Hilts' challenge to his twenty-one month sentence. Hilts contends that the district court clearly erred in calculating his fraud loss for purposes of determining his proper offense level under USSG § 2F1.1, the fraud guideline. His contention is without merit.

USSG § 2F1.1(a) provides a base offense level of six. USSG § 2F1.1(b)(1) provides for incremental increases to that base offense level based upon the amount of "*Loss*," "[i]f the loss exceeded $2,000." District courts are permitted to use the *intended loss* to the victim of the fraudulent scheme at issue as the basis for determining "*Loss*" under USSG § 2F1.1(b)(1), "even if this exceeds the amount of loss actually possible, or likely to occur, as a result of the defendant's conduct." *United States v. Miller*, 316 F.3d 495, 502 (4th Cir. 2003).

Of relevance to Hilts' sentencing challenge, under the heading "Offense Conduct," his Presentence Report (PSR) states that the government provided "this Probation Officer" with the following version of evidence and facts provided at trial:

> Testimony at trial established that defendant picked up liquor at Liquor Locker, JRJ Liquors, and BJ's Liquors until April 28, 1999. The cases from Liquor Locker will not be considered. Adding the cases from JRJ Liquors with those from BJ's through April 28, 1999, totals 12,974 cases. Applying a factor of 90% results in 11,676 cases. The loss for guideline purposes is thus $1,167,600.

(S.J.A., Vol. II, 9). The same section of the PSR also states that Hilts was taking the position that the evidence at trial could not support any amount of fraud loss. The PSR listed "+11 or 0" as the number of offense levels by which to increase Hilts' base offense level in connection with USSG § 2F1.1(b)(1)(L).

At sentencing, after hearing argument from Hilts' attorney, the district court stated:

> I need not hear from [the government] on the amount of loss. I am persuaded from the evidence in trial that the amount of loss attributed by the government set forth in the Presentence Report is correct. And so far as the argument that Mr. Hilts contemplated that this would only stay within the United States, that was a fair argument. It was considered by the jury, which found beyond a reasonable doubt that it wasn't so. So accordingly, on the amount of loss, I need not hear from the government.

(Transcript of Hilts' Sentencing Hearing at 10-11). The district court ultimately adopted all of the proposed findings of the PSR with one exception not relevant here.

We may overturn the district court's $1,167,000 fraud loss finding with respect to Hilts only if we determine that it is clearly erroneous. *United States v. Bolden*, 325 F.3d 471, 495-96 (4th Cir. 2003). Hilts attacks the district court's fraud loss finding chiefly on the basis that the record contains no evidence that he actually transported or assisted others in importing the liquor that he had picked up in Maryland into Canada. We reject this argument. Proof that Hilts actually transported or assisted others in importing the liquor that he picked up in Maryland into Canada is not required, while it is reasonably inferred from the number of times a vehicle registered to Hilts crossed into Canada and then ceased such activity immediately after Hilts abandoned the liquor laden rental truck. Rather, all that is required to support the district court's fraud loss finding is sufficient evidence from which to make a reasonable inference that Hilts intended that such liquor would eventually be smuggled into Canada in order to avoid paying Canada and the Province of Ontario the applicable excise duties and other taxes. The evidence that we discussed in support of Hilts' conviction on Count I, when viewed collectively, constitutes such evidence. In sum, we affirm Hilts' sentence.

VI.

In conclusion, we affirm the Defendants' convictions and Hilts' sentence.[9]

AFFIRMED

[9] We have reviewed the Defendants' remaining assignments of error and find them to be without merit.

GREGORY, Circuit Judge, dissenting:

I.

Pursuant to the common-law revenue rule, I find that the activities at issue in this case are not cognizable under the federal wire-fraud statute, 18 U.S.C. § 1343. Accordingly, I respectfully dissent.

II.

A.

The majority claims to rely on the Restatement's formulation of the revenue rule, which states, "Courts in the United States are not required *to recognize* or enforce judgments for the collection of taxes . . . rendered by the courts of other states." *Ante*, at 327 (citing Restatement (Third) of the Law of Foreign Relations § 483) (emphasis added). Rather than applying this rule as stated, however, the majority narrows its application only to those rare instances in which a court is compelled to actually enforce the judgment of a foreign court, finding that the rule only "pertains to the *nonenforcement* of foreign tax judgments . . . ." *Ante*, at 329 (emphasis added). In so holding, the majority reads the words "to recognize" completely out of the Restatement section on which it purportedly relies. With its constrained application of the revenue rule, the majority has created new law that does not find support in the Restatement, Supreme Court precedent, nor in any of the rulings from our sister circuits.

In *Banco Nacional de Cuba v. Sabbatino*, the Supreme Court suggested that the revenue rule would reach beyond actual enforcement of foreign tax judgments, and extend to any case in which a court would be compelled to "give effect to the . . . revenue *laws* of foreign countries or sister states." 376 U.S. at 412, 413, 84 S.Ct. 923 (1964) (citing *Moore v.*

Mitchell, 30 F.2d 600 (2d Cir. 1929)) (emphasis added). Predating *Banco Nacional de Cuba*, the Court in *Milwaukee County v. M.E. White Company*, although not ultimately deciding the case on revenue rule grounds, specifically recognized that:

> [i]t has often been said, and in a few cases held, that statutes imposing taxes [as opposed to judgments enforcing those statutes] are not entitled to full faith and credit . . . because the courts of one state should not be called upon to scrutinize the relations of a foreign state with its own citizens, such as are involved in its revenue laws, and thus commit the state of the forum to positions which might be seriously embarrassing to itself or its neighbors.

296 U.S. 268, 274-75 (1935) (internal footnotes omitted). In sum, long before Congress' passage of the wire fraud statute at issue in the present case, "the United States Supreme Court acknowledged the broad scope of the revenue rule." *Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 126 (2d Cir. 2001) (citing *Milwaukee Co.*, 296 U.S. at 275, 56 S.Ct. 229).

Additionally, the First Circuit, in *United States v. Boots*, held that the revenue rule is implicated when a United States court is called upon to "effectively pass[ ] on the validity and operation of the revenue laws of a foreign country." 80 F.3d 580, 587 (1st Cir. 1996). In *Boots*, the defendants took part in a scheme to transport tobacco from a Native American reservation in upstate New York into New Brunswick, Canada, without paying taxes and excise duties on the tobacco. To bypass customs checkpoints, the tobacco was transported surreptitiously into Canada through another reservation in Maine. The defendants were charged with and found guilty of conspiracy to commit wire fraud, in violation of 18 U.S.C. §§ 371 and 1343. The First Circuit reversed the convictions, basing its decision primarily on the revenue rule.

Id. at 583-84. The Court explained, "Although this case does not require us to enforce a foreign tax judgment as such, upholding defendants' section 1343 conviction would amount functionally to penal enforcement of Canadian customs and tax laws." *Id.* at 587. With this decision, the First Circuit recognized that the revenue rule applies not only when a foreign law is being enforced, but also when, as the Restatement suggests, an American court is compelled to "recognize" the validity of that foreign law. The *Boots* court continued:

> The scheme to defraud at issue—proof of which is essential to conviction—had as its sole object the violation of Canadian revenue laws. To convict therefore, the district court and this court must determine whether a violation of Canadian tax laws was intended and, to the extent implemented, occurred. In so ruling, our courts would have to pass on defendants' challenges to such laws and any claims not to have violated or intended to violate them.

Id. at 587.

Although it declined to exercise its discretion and dismiss the indictment before it, the Second Circuit, in *United States v. Trapilo*, 130 F.3d 547 (2d Cir. 1997), applied the same formulation of the revenue rule as did the *Boots* court. The *Trapilo* court found that because "there is no obligation to pass on the validity of Canadian revenue law, . . . the common law revenue rule is not properly implicated." *Trapilo*, 130 F.3d at 552-553. That is, the court recognized the converse—had it been required to pass on the validity of a foreign tax law, the revenue rule would have been implicated. This would be true, the court implicitly conceded, even if it

had *not* been required to enforce a judgment based on an application of that law.[10]

This statement of the rule was reaffirmed by the Second Circuit in *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, where the court held, "[U]nder the revenue rule, United States courts avoid the application of a foreign sovereign's tax laws" in order to "avoid entanglement with questions about the underlying validity of a foreign sovereign's laws." 268 F.3d at 126. While acknowledging that "the precise scope of the rule" remains an unanswered question of federal law, *id.* at 109, the court nevertheless determined that "sound policy considerations, including international comity, the proper exercise of sovereign powers, institutional competence and separation of powers, and recognition of the U.S.-Canada tax treaty relationship, support the continuing viability and application of the revenue rule to this case," *id.* at 126.

The First and Second Circuit's recitations of the revenue rule, along with the Supreme Court's understanding of the doctrine, are buttressed by the rule's common law history. At least since the eighteenth century, courts have appreciated the broad scope of the rule, which provides that "[o]ne nation does not take notice of the revenue laws of another." *Planche v. Fletcher*, 99 Eng. Rep. 164, 165 (1779). Even more

[10] As explained in Part II.B., *infra*, although the *Trapilo* court correctly summarized the common-law revenue rule, the court erred in its application of the rule. In fact, the court's ruling in *Trapilo*, which reversed the district judge's decision to dismiss the indictment against the defendants, was called into doubt by the Second Circuit's subsequent decision in *United States v. Pierce*, 224 F.3d 158 (2d Cir. 2000), where the court reversed the convictions of two of the *Trapilo* defendants. The *Trapilo* ruling was further limited by the Second Circuit's opinion in *Attorney General of Canada*, where the court found "the *Boots* reasoning persuasive" in the context of a civil action, and that, as a result, the circuit's earlier reasoning in *Trapilo* was "not controlling here." 268 F.3d at 123-24.

forcefully, in the case of *Holman v. Johnson*, Lord Mansfield recited what he regarded as a firmly established principle, that "no country *ever* takes notice of the revenue laws of another." 98 Eng. Rep. 1120, 1121 (K.B. 1775) (emphasis added). The majority disregards this history, explaining that Lord Mansfield's comments are dicta, and that, accordingly, they "cannot serve as a source of binding authority in American jurisprudence." *Ante*, at 329. The majority's argument, however, is unpersuasive, since I cite English common law, not as binding authority, but as persuasive evidence that courts have long since recognized that the revenue rule applies both to the nonenforcement of foreign tax judgments as well as to the nonrecognition of foreign revenue laws.

Notwithstanding this well-established precedent, both from the English and American courts, the majority crafts an exceedingly narrow view of the revenue rule, limiting its application only to those cases in which a United States court is compelled to actually enforce the collection of a foreign tax judgment, and prohibiting its use in any case requiring a United States Court to pass on the validity of, or give effect to, a foreign revenue law. Because this revision creates a circuit split on an issue where such a division is unwarranted, I dissent from the majority's formulation of the revenue rule.

B.

As is evident from the above discussion, the revenue rule is a discretionary doctrine, one that is guided by "constitutional and prudential considerations. . . ." *Boots*, 80 F.3d at 587. *See also Attorney Gen. of Canada*, 268 F.3d at 113 ("We do not suggest that the revenue rule always bars United States courts from furthering the tax policies of foreign sovereigns."); *Trapilo*, 130 F.3d at 550 (recognizing that "our courts will normally not enforce foreign tax judgments") (emphasis added); *Boots*, 80 F.3d at 587 (noting that "our courts have traditionally been reluctant to enforce foreign revenue laws") (emphasis added); *European Comty. v.*

R.J.R. Nabisco, Inc., 150 F.Supp.2d 456, 476 (E.D.N.Y. 2001) ("The revenue rule is discretionary rather than jurisdictional."); *Restatement (Third) of the Law of Foreign Relations*, § 483 (noting that courts are "not required" to apply the rule). As such, we need not apply the doctrine in every criminal prosecution simply because the prosecution may be colored by some aspect of a foreign revenue rule. In the present case, however, the traditional rationales underlying the rule forcefully support its application.

The rationale of the revenue rule, the First Circuit explained:

> has been said to be that revenue laws are positive rather than moral law; they directly affect the public order of another country and hence should not be subject to judicial scrutiny by American courts; and for our courts effectively to pass on such laws raises issues of foreign relations which are assigned to and better handled by the legislative and executive branches of government.

Boots, 80 F.3d at 587. Similarly, the Second Circuit recently noted that revenue laws "mirror the moral and social sensibilities of a society. Sales taxes, for example, may enforce political and moral judgments about certain products. Import and export taxes may reflect a country's ideological leanings and the political goals of its commercial relationships with other nations." *Attorney Gen. of Canada*, 268 F.3d at 111. Consistent with the well-articulated explanations from the First and Second Circuits, I believe the revenue rule bars wire fraud prosecutions that are premised upon schemes to violate foreign tax laws because "[n]o court ought to undertake an inquiry which it cannot prosecute without determining whether those [foreign revenue] laws are consonant with its own notions of what is proper." *Moore v. Mitchell*, 30 F.2d 600, 604 (2d Cir.1929) (Hand, J., concurring). That such an intrusive inquiry is required here

cannot be denied, as we must determine the validity and application of Canada's tax laws.

The United States, arguing that interpretation of foreign laws is unnecessary, relies on the Second Circuit's decision in *Trapilo*, where the court explained that the wire fraud statute proscribed the "use of the telecommunications systems of the United States in furtherance of a scheme whereby one *intends* to defraud another of property. Nothing more is required. The identity and location of the victim, and the success of the scheme, are irrelevant." 130 F.3d at 552 (emphasis in original). Based on this observation, the *Trapilo* court concluded that the revenue rule would be inapplicable to the government's wire fraud prosecution because "[a]t the heart of th[e] indictment [was] the misuse of the wires in furtherance of a scheme to defraud the Canadian government of tax revenue, not the validity of a foreign sovereign's revenue laws." *Id.* at 552.

The flaw in the *Trapilo* court's reasoning is transparent. The court recognized the need for evidence of a scheme to defraud another of property, but then erred by simply assuming that the property—Canada's right to tax revenues—existed. *Id.* at 552. The tax revenues would have existed, of course, only if the liquor at issue in *Trapilo* had been subject to the relevant revenue laws. That is, the existence of property necessarily depended upon the court's analysis of Canada's tax laws. The *Trapilo* court, as a matter of logic, actually did inquire into the validity of a foreign sovereign's tax laws, without even realizing that it had done so.

This failing in the *Trapilo* court's reasoning was recognized by the Second Circuit in *United States v. Pierce*, 224 F.3d 158 (2000), where the court stated:

> We did not say or suggest in *Trapilo*, however, that it did not matter whether Canada in fact taxed or levied a duty on liquor sales or imports, or that a guilty mind without something about which to feel guilty was a

> crime. And while we assumed in *Trapilo* that the government would be able to prove what the indictment alleged, we must on this appeal determine whether the government in fact did so at trial.

Id. at 167. The *Pierce* court then reversed the convictions before it, based on the insufficiency of the evidence, explaining:

> A scheme to deceive, however dishonest the methods employed, is not a scheme to defraud in the absence of a property right for the scheme to interfere with. . . . The Pierces are not accused of scheming to defraud the Canadian government of its property, but of its *right* to obtain property, its *right* to be paid money. To prove the existence of a scheme to defraud the Canadian government[,] the prosecution had to prove the existence of such a right.

Id. at 165 (emphasis in original).

Usually, both the identity of the victim and the success of the scheme are irrelevant to a wire fraud prosecution. *See Trapilo*, 130 F.3d at 552. When the victim is a foreign sovereign, however, these factors take on a new importance. In the present case, to determine whether there was a scheme to defraud another of *property*, this court would have to conclude that Canada's and Ontario's "right to be paid money" had materialized. *Pierce*, 224 F.3d at 165. That is, we would have to find that the defendants had succeeded in their scheme, at least in so far as to actually transport liquor across the Canadian-American border. Stated differently, had the defendants been captured before a single bottle of alcohol crossed into Canada, they could not have been prosecuted under the wire fraud statute because the requisite property would never have come into existence. *See id.* No foreign taxes would be owed.

It is inescapable that in passing on whether defendants intended to violate Canadian law and deprive Canada of its

right to taxes and duties owing on actually imported liquor, "our courts would have to pass on defendants' challenges to such laws and any claims not to have violated or intended to violate them." *Boots*, 80 F.3d at 587. The United States, in count one of the underlying indictment, charged, "At all times relevant to the Indictment, the governments of Canada and the Province of Ontario levied excise duties and taxes on the importation and sale of liquor." By alleging the existence of foreign revenue laws, the government effectively conceded that the applicability of Canadian law was central to its case.

The government reasserted the importance of these foreign excises during sentencing. In proposing sentences for the district court to consider, the prosecution turned not to the United States Sentencing Guidelines as one might expect, but rather to *Canadian revenue law*. The government concluded that "Canadian customs duties and excise taxes on a typical case of liquor [totaled] approximately $100 American." Based on its understanding of foreign law, the government then attempted to calculate the amount of tax revenue that would have been paid to foreign sovereigns had the liquor been lawfully imported into Canada. In figuring the tax losses for which David and Carl Pasquantino could be held responsible, the prosecution suggested the figure of $3,589,200.00. In making the same calculation in Arthur Hilts' case, the government arrived at the figure of $1,167,600.00.

The government's—and the court's—reliance on Canadian revenue law at sentencing is particularly revealing. The base offense level for a violation of 18 U.S.C. § 1343, is 6. For defendants with a criminal history category of I, the guideline range for a violation of the federal wire fraud statute is 0-6 months. The sentences received by the defendants, however, were substantially more severe. For each count of conviction, Carl and David Pasquantino were sentenced to 57 months of imprisonment, to be served concurrently, and Arthur Hilts

was sentenced to a term of 21 months for his conviction on count one of the indictment. The court arrived at these longer terms of imprisonment by increasing the defendants' offense levels based on the amount of loss to the victim, which in this case was the lost tax revenue to the Canadian and Ontario governments. The Pasquantinos' offense levels were increased by 13 and Arthur Hilts' offense level was increased by 11.[11] Because the bulk of the defendants' sentences were related, not to the American crime of wire fraud, but to the Canadian crime of tax evasion, I conclude that this case was primarily about enforcing Canadian law.

The court's reliance on the government's amount-of-loss computations is deeply troubling for another reason as well—the calculations were not based on any specific knowledge of what the tax liability would have been for the defendants. Instead, the court relied wholly on the testimony of Gina Marie Jonah, an intelligence officer with Canadian Customs. Officer Jonah, who was not offered as an expert witness, testified as to the approximate amount of tax that is generally owed on liquor imported into Canada. She commented, "Alcohol is taxed very high in Canada," but she did not reference any provisions of Canadian law in making this observation. Rather, based on her experience in working at the border, she surmised that on a case of alcohol worth $56 American, Canadian taxes would probably equal $100 American.

The district court never determined whether Officer Jonah's calculations were accurate as a matter of Canadian law. Notwithstanding this uncertainty, the court relied on

[11] In addition to the 13 and 11-level adjustments mentioned above, each of the defendants received an upward adjustment of 2 levels for a crime that involved more than minimal planning. The Pasquantinos received an additional 4-level increase for their organizing role in the offense. Arthur Hilts received a 3-level decrease for his minimal role in the offense.

these calculations to determine the defendants' offense levels under the Sentencing Guidelines. Of course, had it engaged in a more detailed application of foreign tax law, the court could have clarified the ambiguity regarding the amount of loss to the Canadian government. Yet that inquiry would have required precisely the kind of analysis that the common-law revenue rule seeks to avoid.

III.

Lastly, it must be noted that applying the revenue rule in this case would not mean that any of the defendants would go unpunished; they have all been indicted in Canada for two breaches of Canadian criminal law: (1) failure to file excise taxes; and (2) possession of unlawfully imported spirits. The Executive should determine whether to extradite the defendants to Canada to face these charges. The Canadian courts could then decide the issue that is at the core of both the American and Canadian prosecutions: whether, and to what extent, the defendants have defrauded the governments of Canada and Ontario out of tax revenues owed pursuant to their own, sovereign, excise laws.

Judge Michael joins in this dissent.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 01-4463, 01-4464, 01-4465

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID B. PASQUANTINO,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CARL J. PASQUANTINO,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ARTHUR HILTS, A/K/A BUTCH,
Defendant-Appellant.

September 30, 2002

OPINION

Before GREGORY, Circuit Judge, HAMILTON, Senior Circuit Judge, and Gerald Bruce LEE, United States District Judge for the Eastern District of Virginia, sitting by designation.

GREGORY, Circuit Judge:

Appellants were indicted and convicted of engaging in a scheme to defraud the governments of Canada and the Province of Ontario of excise duties and tax revenues applicable to the importation and sale of liquor. They assert that the district court erred in denying their pretrial motion to dismiss the indictment because a scheme to defraud a foreign government of duties and taxes is not cognizable under the wire fraud statute, 18 U.S.C. § 1343.[12] We agree with this assertion, and for the reasons that follow, we reverse appellants' convictions.

I.

Years ago, after Canada increased the sin taxes on alcohol and cigarettes to such a level that Canada's taxes greatly exceeded comparable United States taxes, a Canadian black market for such goods emerged. Capitalizing on this situation, appellants David and Carl Pasquantino, residents of Niagara Falls, New York, developed a scheme where, with the help of drivers such as appellant Arthur Hilts, they would purchase large quantities of low end liquor from discount liquor stores in Maryland, transport the liquor to New York,

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[12] Appellants also contend that their motion for judgment of acquittal should have been granted because the evidence presented at trial was insufficient to support a wire fraud conviction. Appellant Hilts further argues that if the conviction is upheld, he is entitled to a new sentencing because the district court failed to make a determination as to the scope of his jointly undertaken criminal activity. Because we resolve this case on appellants' first contention, that the indictment should have been dismissed, we need not address these secondary arguments.

store it there, and then smuggle the liquor into Canada in the trunks of cars. While all applicable Maryland and federal taxes were paid on the liquor, there is no evidence that any Canadian taxes or duties were ever paid on the liquor that was transported into Canada. The enterprise began in 1996 and continued through May 2000.

The Bureau of Alcohol, Tobacco and Firearms (BATF) was alerted to the scheme after agents, routinely tracking Maryland liquor purchases, discovered that eight retail liquor stores in Maryland were buying unusually large quantities of lower cost liquors from wholesalers. A criminal investigation ensued, with two of the store owners cooperating proactively with investigating agents.[13] These store owners recorded telephone conversations, and advised agents of calls and visits from appellants.

BATF agents obtained numerous telephone, truck rental, and motel records, all of which evidenced the scheme.[14] Border crossings were monitored electronically, tracking license plates of vehicles entering Canada. Several vehicles, registered to drivers involved in the scheme, failed to stop for a second inspection when requested. BATF and Royal Canadian Mounted Police also conducted surveillance on David and Carl Pasquantino and their associates loading liquor in Maryland and unloading it in Canada after it was smuggled through customs. Marked bottles of liquor were recovered in Canada.

Appellants were indicted, along with four other individuals, on six counts of wire fraud, in violation of 18 U.S.C.

[13] In exchange for their cooperation, the store owners were not prosecuted for violations of U.S. Department of Treasury Regulations that they record and report bulk sales of alcohol.

[14] David and Carl Pasquantino made numerous interstate telephone calls from Niagara Falls, New York to Hagerstown, Maryland in order to place large liquor orders with the discount stores in Maryland.

§ 1343.[15] They filed a motion to dismiss the indictment on the ground that the district court lacked subject matter jurisdiction, arguing that a scheme to defraud a foreign government of tax revenues is not cognizable under the wire fraud statute. The district court denied the motion and the case proceeded to jury trial.

At trial, the eight Maryland liquor store owners testified for the government about their dealings with the Pasquantinos. In addition to the store owners, two men who had been involved in the scheme testified that they transported liquor for David and Carl Pasquantino from the United States into Canada, and that the Pasquantinos paid them cash for each run. Canada Customs intelligence officer Gina Jonah testified that there is a Canadian federal excise tax and general sales tax, as well as a Liquor Control Board of Ontario tax and a provincial sales tax on liquor imported from the United States into Canada. J.A. 177 78. Officer Jonah, a seventeen year employee with Canada Customs, explained that the equivalent of approximately $100 in United States currency would be due and owing on a case of liquor that was purchased in the United States and imported into Canada. She stated that generally the amount of Canadian tax due is twice the purchase price of the case of liquor in the United States.

David and Carl Pasquantino were convicted on all six counts of the indictment and sentenced to 57 months imprisonment on each count, to be served concurrently. Before the case was submitted to the jury, the district court dismissed all but Count I against Arthur Hilts. Hilts was

[15] They were also indicted in Canada for failure to file excise taxes and possession of unlawfully imported spirits, though the status and disposition of the Canadian charges is not evident in the record provided to us.

convicted on that count and sentenced to 21 months. This appeal followed.

II.

The threshold question here involves whether a scheme to evade the taxes of another country can be prosecuted as wire fraud by the United States government. Appellants argue that the trial court erred in denying their motion to dismiss the indictment. When reviewing the denial of a motion to dismiss an indictment, this Court reviews the district court's factual findings for clear error and its legal conclusions *de novo*. *See United States v. Ward*, 171 F.3d 188, 193 (4th Cir. 1999). Because the issue involves a pure question of law, whether the scheme alleged in the indictment is cognizable under the wire fraud statute, our review here is *de novo*. *See United States v. United Medical and Surgical Supply Co.*, 989 F.2d 1390, 1398 (4th Cir. 1993).

III.

Wire fraud requires proof of 1) a scheme to defraud, and 2) the use of a wire communication in furtherance of that scheme.[16] *See United States v. Bollin*, 264 F.3d 391, 407 (4th Cir. 2001). The Supreme Court has been clear that the mail and wire fraud statutes are limited in scope to schemes aimed at causing deprivation of money or property. *See McNally v. United States*, 483 U.S. 350 (1987). Appellants argue that

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[16] At the time of the offense, the wire fraud statute provided:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire . . . communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both . . . .

18 U.S.C. § 1343 (2000).

1) Canada's tax revenues do not qualify as "property" within the scope of the wire fraud statute, and 2) the prosecution is barred by the principles underlying the common law revenue rule.

A.

Appellants first argue that under the Supreme Court's recent decision in *Cleveland v. United States*, 531 U.S. 12 (2000), Canada's right to collect taxes and duties is not a property right for purposes of the wire fraud statute. Appellants point to language from *Cleveland*, where the Court explains, "[i]t does not suffice, we clarify, that the object of the fraud may become property in the recipient's hands; for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim."[17] *Cleveland*, 531 U.S. at 15. Appellants' reliance on this statement evinces a misunderstanding of *Cleveland*. In *Cleveland*, the Court held that an unissued video poker license held by a state did not constitute property. *Id.* at 20. Though the license becomes the property of the licensee (the recipient) after it is issued, a government regulator does not part with property when it issues a license. *Id.* In other words, the license in *Cleveland* was *never* capable of being property in the hands of the *victim*. On the other hand, it is well established that "property" may comprise both tangible and intangible property rights, *see Carpenter v. United States*, 484 U.S. 19, 25 (1987), and that a government has a property right in tax revenues when they accrue, *see Manning v. Seeley Tube & Box Co.*, 338 U.S. 561, 566 (1950). *Cleveland* does not say otherwise. Indeed, (*Cleveland* recognized that the government "nowhere allege[d] that Cleveland defrauded the State of any money to which the state was entitled by law."

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[17] Because the mail and wire fraud statutes share the same language in relevant part, we apply the same analysis to both offenses. *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987).

Cleveland, 531 U.S. at 22. Here, it was alleged that Canada was defrauded of tax revenues it was entitled to by law.[18] Canada's right to collect taxes is therefore a sufficient property right for wire fraud purposes, unaffected by the Court's decision in *Cleveland*.

B.

Though Canada's right to collect taxes is a property right for Cleveland purposes, determination of whether Canada was actually or would have been *entitled to the tax revenues* involves an inquiry into the validity and operation of a foreign revenue law. We find that the principles underlying the revenue rule bar such an inquiry, and therefore bar appellants' prosecution in this case. Whether the revenue rule is applicable in wire fraud prosecutions is an issue of first impression in our circuit. Though we have not before considered the issue, two of our sister circuits have done so, and have reached dramatically different conclusions. The First Circuit, in *United States v. Boots*, 80 F.3d 580 (1st Cir. 1996), dismissed a similar indictment, while the Second Circuit has upheld convictions for schemes to defraud a foreign government of tax revenues, *United States v. Trapilo*, 130 F.3d 457 (2d Cir. 1997). As evidenced by the split in authority, this issue presents a difficult question indeed. However, after careful review, we agree with the First Circuit

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[18] The alleged purpose of appellants' scheme was to defraud Canada of tax revenue. Though Canada's interest would not vest until appellants crossed the border, the fact remains that when the scheme came to fruition, if the appellants succeeded in completing border crossings without paying the duties (which they did here), Canada would be deprived of revenues. The tax debt would be property in Canada's hands. Because success of the scheme is irrelevant, *see Durland v. United States*, 161 U.S. 306, 315 (1896), the inquiry is whether, if the scheme succeeded, the victim here, the government of Canada, would have been deprived of something in which it held a property right. Here, it would have.

that a scheme to defraud a foreign government of tax revenues is not cognizable under the wire fraud statute. The indictment against appellants should have been dismissed by the district court.

In Boots, the defendants took part in a scheme to transport tobacco from a Native American reservation in upstate New York into New Brunswick, Canada, without paying taxes and excise duties on the tobacco. *Id.* at 583. To bypass customs checkpoints, the tobacco was transported surreptitiously into Canada through another reservation in Maine. *Id.* The defendants were charged with and found guilty of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 371 and § 1343. *Id.* at 584. The First Circuit reversed the convictions, basing its decision primarily on the revenue rule. *Id.* The Court explained that the "rationale of the revenue rule has been said to be that revenue laws are positive rather than moral law; they directly affect the public order of another country and hence should not be subject to judicial scrutiny by American courts; and for our courts effectively to pass on such laws raises issues of foreign relations which are assigned to and better handled by the legislative and executive branches of government." *Id.*

The First Circuit further explained:

> [t]he scheme to defraud at issue—proof of which is essential to conviction—had as its sole object the violation of Canadian revenue laws. To convict therefore, the district court and this court must determine whether a violation of Canadian tax laws was intended and, to the extent implemented, occurred. In so ruling, our courts would have to pass on defendants' challenges to such laws and any claims not to have violated or intended to violate them. *Where a domestic court is effectively passing on the validity and operation of the revenue rules of a foreign country,* the important concerns underlying the revenue rule are implicated.

Id. (emphasis added). Of "particular concern" to the First Circuit was "the principle of noninterference by the federal courts in the legislative and executive branches' exercise of their foreign policymaking powers." *Id.* at 587 88.[19]

We agree with the First Circuit. When the United States attempts to punish a crime whose sole objective is the violation of another country's revenue laws, the "important concerns underlying the revenue rule" are indeed implicated. *Boots*, 80 F.3d at 587. Though this case "does not require us to enforce a foreign tax judgment as such, upholding [appellants'] section 1343 conviction would amount functionally to penal enforcement of Canadian customs and tax laws." *Id.*

The revenue rule is a "longstanding common law doctrine providing that courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns." *Attorney General of Canada v. R.J Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 109 (2d Cir. 2001) (providing a detailed history of the revenue rule). As the Supreme Court has recognized, many courts in the United

[19] In addition to the revenue rule, the First Circuit also noted that the federal statute criminalizing the smuggling of goods into foreign countries punishes smuggling only if the foreign government has a reciprocal law. *Boots*, 80 F.3d at 588; *see* 18 U.S.C. § 546. It opined that a decision to uphold the wire fraud convictions "would have the effect of licensing prosecutions against persons who use the wires to engage in smuggling schemes against foreign governments irrespective of whether a particular government had the reciprocal arrangement called for in section 546." *Id.* "Effect cannot be given to section 1343 in these conditions without threatening the reciprocity provision of section 546, and offending generally the salutary principles underlying the revenue rule." *Id.* The Court then found its conclusion further supported by the "rule of lenity," stating that if Congress "had meant to authorize the courts to enforce this kind bf application of the wire fraud statute, 'it must speak more clearly than it has.'" *Id.* (citing *McNally v. United States*, 483 U.S. 350, 360 (1987)).

States have adhered to the principle that a court need not give effect to the penal or revenue laws of foreign countries. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 413 14 (1964). In this case, the act of smuggling liquor into Canada to avoid import taxes is deplorable. The appellants' scheme was a money making one, with the governments of Canada and Ontario as the victims. However, the fact remains that this prosecution involves Canada's tax laws. As the Second Circuit recently explained:

> [t]ax laws embody a sovereign's political will. They create property rights and affect each individual's relationship to his or her sovereign. They mirror the moral and social sensibilities of a society. Sales taxes, for example, may enforce political and moral judgments about certain products. Import and export taxes may reflect a country's ideological leanings and the political goals of its commercial relationships with other nations.

R.J. Reynolds, 268 F.3d at 111. We believe that there are essentially two reasons the revenue rule acts to bar wire fraud prosecutions for schemes to violate foreign tax laws.

First, we are of the opinion that "[n]o court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper." *Moore v. Mitchell*, 30 F.2d 600, 604 (2d Cir. 1929) (Hand, J., concurring). Expansion of the mail and wire fraud statutes to reach violations of foreign tax laws "risks turning federal prosecutors and investigators into de facto criminal law enforcement agents for [certain] foreign tax authorities." Kathryn Keneally, *The U.S. Prosecutes Foreign Tax Evasion as a Domestic Crime—With Far Reaching Consequences*, 88 J. Tax'n 224, 229 (April 1998). The revenue rule allows our courts to avoid becoming ensnared in the difficult decisions concerning which foreign tax laws we, through criminal prosecutions here, will help to

enforce.[20] The revenue rule should not be viewed as a means for guilty defendants to escape punishment, but rather it should be seen as an important protection mechanism for our courts.

Second, the revenue rule allows our courts to avoid interpreting and applying foreign tax laws. The government, arguing that interpretation of foreign laws is not needed here, relies on the Second Circuit's decision in *Trapilo*, 130 F.3d 457 (2d Cir. 1997), which categorically rejected the *Boots* decision. We find *Trapilo's* rationale to be flawed."[21] In its rejection of *Boots*, the Second Circuit explained that under the wire fraud statute, what is proscribed is the use of the wires "in furtherance of a scheme whereby one intends to

[20] In a wire fraud prosecution such as this, where the violation of foreign taxes is at issue, a decision will always have to be made regarding whether or not to prosecute. In the case at hand, the decision was probably an easy one, given 1) the United States' good relations with Canada, and 2) the fact that a tax on liquor is generally thought by most to be acceptable. Imagine, however, that appellants had engaged in a similar scheme to travel overseas and defraud Afganistan or Iraq of tax revenues. Must the United States also prosecute such similar schemes? Where do we draw the line as to which countries' laws we will help enforce? Furthermore, imagine that Canada imposed an import duty on bibles, and appellants schemed to smuggle bibles rather than liquor. The revenue rule was created in part to avoid these types of political and foreign policy based determinations. If we were to uphold appellants' convictions, our actions would at most run afoul of the principles underlying the revenue rule and at least encourage selective prosecution.

[21] In *Trapilo*, the defendants were charged in a one count indictment with money laundering conspiracy in violation of 18 U.S.C. § 1956(a)(1)(2) and (h). Reversing the district court's dismissal of the indictment, the Second Circuit found that the language of the wire fraud statute unambiguously prohibits the use of interstate or foreign communication systems by anyone who intends to "devise any scheme or artifice to defraud." *Trapilo*, 130 F.3d at 551 (emphasis in original). The Court noted that the statute neither expressly, nor impliedly, precludes the prosecution of a scheme to defraud a foreign government of tax revenue. *Id.*

defraud another of property. Nothing more is required. The identity and location of the victim, and the success of the scheme, are irrelevant." *Id.* at 552 (emphasis added)."[22] The Court stated that "the common law revenue rule, inapplicable to the instant case, provides no justification for departing from the plain meaning of the statute," because "[a]t the heart of this indictment is the misuse of the wires in furtherance of a scheme to defraud the Canadian government of tax revenue, *not the validity of a foreign sovereign's revenue laws.*"[23] *Trapilo*, 130 F.3d at 551-52 (emphasis added).

Generally, we would agree that the identity and location of the victim in a wire fraud case are irrelevant. However, when that victim is a foreign government, that identity takes on a new importance. Here, in order to determine whether Canada was deprived of property (tax revenues), a determination must be made into whether Canada's tax laws were in fact broken, or were *intended* to be broken. The Second Circuit opined that the validity of Canada's revenue laws is not an issue. Rather, it has found that all that is necessary to prosecute a defendant for wire fraud in the United States is evidence that Canada imposes a duty on imported liquor, i.e., evidence of the *existence* of a foreign tax or duty. *United States v. Pierce*, 224 F.3d 158, 166 (2d Cir. 2000). But recognizing the *existence* of a law is inherently and ines-

[22] The Court explained that the "intent to defraud does not hinge on whether or not defendants were successful in violating Canadian revenue law, as '[s]ection 1341 [as well as § 1343] punishes the scheme, not its success.'" *Trapilo*, 130 F.3d at 552 (citing *United States v. Helmsley*, 941 F.2d 71, 94 (2d Cir. 1991)).

[23] Though the Second Circuit has refused to apply the revenue rule in criminal wire fraud prosecutions, if has recognized the validity of the rule, and in fact used it to bar a civil RICO claim brought by the Attorney General of Canada to recover damages for lost tax revenues. *R.J. Reynblds*, 268 F.3d 103 (2d Cir. 2001). Unlike the *R.J. Reynolas* majority, we see "no basis in the revenue rule itself for treating criminal and civil cases differently." *Id.* at 138 (Calabresi, J., dissenting).

capably tied to recognizing the *validity* and *scope* of that law. Certainly, prosecuting a defendant for violations of a law, or for attempting to violate that law, requires an inquiry into the applicability and validity of the law.

It is inescapable that in passing on whether defendants intended to violate Canadian law and deprive Canada of its right to collect taxes and duties, "our courts would have to pass on defendants' challenges to such laws and any claims not to have violated or intended to violate them." *Boots*, 80 F.3d at 587. For example, a defendant accused of wire fraud may assert a defense of legal impossibility. If what a defendant intended to do was not a violation of the law, then certainly there could be no deprivation of property for wire fraud purposes. There would be no property right with which a defendant attempted to interfere. In such a case a *United States* court would be required to determine whether the defense to a *Canadian law* would lie.

In this case, the validity and operation of a foreign law is at issue. The Second Circuit, certainly justified in wanting to punish this smuggling scheme, has attempted to side step the important concerns underlying the revenue rule. We believe that the First Circuit took the better course, and we hold that a scheme to defraud a foreign government of tax revenues is not cognizable under the wire fraud statute.

IV.

For the foregoing reasons, we reverse appellants' convictions and remand to the district court with instructions to dismiss the indictment.

REVERSED

HAMILTON, Senior Circuit Judge, dissenting:

I fully agree with the majority opinion's holding that a government's right to collect taxes based upon its revenue laws is a sufficient property right for purposes of the federal

wire fraud statute, 18 U.S.C. § 1343. *Ante* at 7. However,, I sharply disagree with the majority opinion's holding "that a scheme to defraud a foreign government of tax revenues is not cognizable under the [federal] wire fraud statute." *Ante* at 12. Thus, on this second point, I respectfully dissent.

As the majority opinion acknowledges, "[t]he revenue rule is a 'longstanding common law doctrine providing that courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns.'" *Ante* at 9 (quoting *Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 109 (2d Cir. 2001)). The majority candidly admits that "this case 'does not require us to enforce a foreign tax judgment as such . . . .'" *Id.* (quoting *United States v. Boots*, 80 F.3d 580, 587 (1st Cir. 1996)). However, the majority opinion goes on to hold that the common law revenue rule bars the appellants' prosecution for the multiple federal wire fraud violations as charged in their indictment because such prosecution "'amount[s] functionally to penal enforcement of Canadian customs and tax laws.'" *Id.* (quoting *Boots*, 80 F.3d at 587). This holding by the majority rests upon flawed premises and is at odds with Supreme Court precedent. Accordingly, I am constrained to dissent.

Critically, prosecution of the appellants in this case for multiple violations of the federal wire fraud statute, 18 U.S.C. § 1343, *does nothing* civilly or criminally to enforce any tax judgments or claims that Canada or the Province of Ontario has or will obtain against the appellants based upon the appellants' conduct in this case. Rather, prosecution of the appellants *enforces a criminal statute enacted by the United States Congress and contained in the United States Code* that plainly prohibits the very conduct in which the appellants engaged i.e., the use of wire communications in the United States, in interstate or foreign commerce, for the purpose of executing a scheme or artifice to defraud another of its

property. Such enforcement has the singular goal of vindicating the intended purpose of the federal wire fraud statute "to prevent the use of [our telecommunication systems] in furtherance of fraudulent enterprises." *United States v. Trapilo*, 130 F.3d 547, 552 (2d Cir. 1997) (internal quotation marks omitted) (alteration in original). Here, the fact that the property at issue in the appellants' wire fraud scheme belonged to foreign governments by virtue of those governments' respective revenue laws is merely incidental to the application of the federal wire fraud statute. *Id.* (federal wire fraud statute proscribes use of telecommunication systems of the United States in furtherance of scheme whereby one intends to defraud another of property, and identity and location of victim are irrelevant). In short, the common law revenue rule does not require that we reverse the appellants' convictions and remand with instructions that the indictment be dismissed. *Id.* at 551 ("The [federal wire fraud] statute neither expressly, nor impliedly, precludes the prosecution of a scheme to defraud a foreign government of tax revenue, and the common law revenue rule . . . provides no justification for departing from the plain meaning of the statute.").

The majority holding is also at odds with Supreme Court precedent holding that federal courts are not free to alter the plain language of a federal statute as a matter of policy. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("Courts do not, of course, have free rein to impose [common law] rules of preclusion, as a matter of policy, when the interpretation of a statute is at hand."). Admittedly, "where a common law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." *Id.* (internal quotation marks and citations omitted). However, such is definitely not the situation here. There is simply no basis on which to reasonably conclude that prior to

Congress' enactment of the federal wire fraud statute on July 16, 1952, well established common law provided that the courts of one sovereign would not criminally prosecute a person who devised or intended to devise a wire fraud scheme to defraud a foreign sovereign of its property rights when such property rights are in the nature of accrued tax revenue. Accordingly, the majority opinion's holding that "a scheme to defraud a foreign government of tax revenues is not cognizable under the [federal] wire fraud statute," *Ante* at 12, is purely an imposition of its own expanded version of the common law revenue rule' on the federal wire fraud statute as a matter of judicial policy. As such, the majority opinion does nothing less than judicially rewrite the plain language of the wire fraud statute so that it no longer prohibits a person from devising or intending to devise a wire fraud scheme to defraud a foreign sovereign of its property rights when such property rights are in the nature of accrued tax revenues. Because federal courts have no authority to engage in such an exercise, I cannot agree with the majority opinion. I would affirm the appellants' convictions across the board.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

CRIMINAL CASE NO. JFM-00-202

UNITED STATES OF AMERICA

V.

DAVID B. PASQUANTINO
CARL J. PASQUANTINO
ARTHUR HILTS,

Defendants

Wednesday, February 7, 2001
Baltimore, Maryland

TRANSCRIPT OF TRIAL
HONORABLE J. FREDERICK MOTZ,
UNITED STATES DISTRICT JUDGE.

* * * * *

[133] MR. WELSH: Next witness will be Gina Jonah.
OFFICER GINA JONAH, GOVERNMENT WITNESS, SWORN

THE WITNESS: Yes, I do.

THE CLERK: Please be seated. Please speak directly into the microphone. State your full name for the record and spell your last name, please.

THE WITNESS: My name is Gina Marie Jonah. My last name is J-O-N-A-H.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. WELSH:

Q How are you employed, Ms. Jonah?

A I am employed through Canada Customs, the Intelligence [134] Division.

Q And what is your position called?

A I'm an intelligence officer.

Q How long have you been employed with Canada Customs?

A Seventeen years.

Q Are you familiar with the rules and regulations that pertain to the importation into Canada of alcoholic beverages?

A Yes, I am.

Q And would you describe for the Court and the jury what, if any, taxes or duties are due and owing on alcohol that is imported from the United States into Canada?

A Alcohol is taxed very high in Canada. There is an excise tax, that is a federal tax, that is applied, depending on the value of it, the U.S. purchase price. There is a general sales tax that is also a federal tax. There is a Liquor Control Board of Ontario tax. And there also is a provincial sales tax.

Q Now, in this case, in preparation for your testimony, did you calculate the taxes that would be due and owing on a case of alcohol that was purchased in the United States for $56 American?

A Yes, I did.

Q All right. And would you give us the results of your calculation? What taxes would be due and owing if that same case of alcohol were taken into Canada?

A $157.

Q Now, is that American or Canadian? [134]

A That is Canadian.

Q So that would be somewhat less than that in American, is that correct?

A Yes. That's correct.

Q Somewhere around $100?

A Correct. Yes.

Q Depending on the exchange rate at the moment, right?

A That's right. And the purchase price of the alcohol at the moment.

Q So is it fair to say roughly the amount of tax is twice the value of the case of liquor?

A Yes, it is.

* * * * *

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

UNITED STATES OF AMERICA

v.

DAVID B. PASQUANTINO
TERRY FRASER
FRANCIS A. GILLOTTI
GERARD T. CICCONE
COSMO D. CANDIDO
ARTHUR HILTS, a/k/a BUTCH

Criminal No JFM-00-0202

[Wire Fraud, 18 USC §1343; Aiding and Abetting, 18 USC §2; Interstate Transportation of Firearm with Intent to Commit a Felony, 18 USC §924(b)]

INDICTMENT

COUNT ONE

The Grand Jury for the District of Maryland charges that:

1. At all times relevant to this Indictment, (A) Valley Wine & Spirits Inc., 17301 Valley Mall Road, Hagerstown, Maryland 21740, (B) Thurmont Liquors Inc., 425 N. Church Street, Thurmont, Maryland 21786, (C) Tom & Map LLC t/a BJ's Liquors, 506 E. Ridgeville Boulevard, Mt. Airy, Maryland 21771, (D) JRJ Liquors Inc., 929 Pennsylvania Avenue, Hagerstown, Maryland 21742, (E) Central City Liquors Inc., 401 W. Washington Street, Hagerstown,

Maryland 21740, (F) Four Buttons Inc. t/a Buttons Liquor, 24 W. Ridgely Road, Lutherville, Maryland 21093, and (G) Franmar Inc. t/a Chocolate Park Tavern, 14449 McAfee Hill Road, Cascade, Maryland 21719 were licensed to conduct retail sales of liquor in the State of Maryland.

2. At all times relevant to the Indictment, the governments of Canada and the Province of Ontario levied excise duties and taxes on the importation and sale of liquor.

The Scheme to Defraud

3. From in or about March 1997 until the date of this Indictment, in the State and District of Maryland and elsewhere, the defendants

DAVID B. PASQUANTINO
CARL J. PASQUANTINO
TERRY FRASER
FRANCIS A. GILLOTTI
GERARD T. CICCONE
COSMO D. CANDIDO
and
ARTHUR HILTS a/k/a BUTCH

knowingly and willfully devised and intended to devise a scheme and artifice to defraud the governments of Canada and the Province of Ontario of excise duties and tax revenues relating to the importation and sale of liquor.

4. It was part of the scheme and artifice to defraud that the defendants and others known arid unknown to the Grand Jury participated in and operated an illegal venture to smuggle liquor from the United States into Canada without the payment of Canadian and Provincial excise duties and taxes.

5. It was part of the scheme and artifice to defraud that the defendants ordered by telephone and purchased in Maryland wholesale quantities of liquor from the liquor retailers listed in paragraph 1 above.

6. It was part of the scheme and artifice to defraud that the defendants rented and obtained trucks and vans to transport the liquor.

7. It was part of the scheme and artifice to defraud that the defendants transported, or caused the transportation of the liquor from Maryland to upstate New York and ultimately into Canada.

8. It was part of the scheme and artifice to defraud that the defendants maintained storage locations in upstate New York as staging areas for the smuggling of the liquor into Canada.

9. It was part of the scheme and artifice to defraud that the defendants made numerous interstate and international telephone calls in furtherance of the smuggling venture.

10. It was part of the scheme and artifice to defraud that the defendants traveled interstate and internationally in furtherance of the smuggling venture.

11. It was part of the scheme and artifice to defraud the defendants smuggled more than 39,000 cases of liquor into Canada, by hiding the liquor in vehicles which were driven across the border, thereby depriving the governments of Canada and the Province of Ontario or more than $5.8 million Canadian in excise duties and tax revenues.

12. It was part of the scheme and artifice to defraud that the defendant GERARD T. CICCONE carried a firearm with him while he was transporting liquor.

Execution of the Scheme to Defraud

13. On or about March 9, 1999, in the State and District of Maryland and elsewhere, the defendants

DAVID B. PASQUANTINO
CARL J. PASQUANTINO
TERRY FRASER
FRANCIS A. GILLOTTI

GERARD T. CICCONE
COSMO D. CANDIDO
and
ARTHUR HILTS a/k/a BUTCH

knowingly and willfully executed and attempted to execute the scheme to defraud, in that they caused signs, signals, and sounds to be transmitted by means of wire communication in interstate commerce, that is, a telephone call between telephone number 716-298-4734, listed to DAVID PASQUANTINO in Niagara Falls, New York. and telephone number 301-582-4444, located at Valley Wine and Spirits in Hagerstown, Maryland.

Title 18 U.S.C. §§1343 and 2

COUNT TWO

And the Grand Jury for the District of Maryland further charges that:

1. Paragraphs One through Twelve of Count One of this indictment are realleged and incorporated by reference as though fully set forth herein.

2. On or about June 5, 1999, in the State and District of Maryland, and elsewhere, the defendants

DAVID B. PASQUANTINO
CARL J. PASQUANTINO
TERRY FRASER
FRANCIS A. GILLOTTI
GERARD T. CICCONE
COSMO D. CANDIDO
and
ARTHUR HILTS a/k/a BUTCH

knowingly and willfully executed and attempted to execute the scheme to defraud, in that they caused signs, signals, and sounds to be transmitted by means of wire communication in

interstate commerce, that is, a telephone call between telephone number 716-298-4734, listed to DAVID PASQUANTINO in Niagara Falls, New York, and telephone number 301-582-4444, located at Valley Wine and Spirits in Hagerstown, Maryland.

Title 18 U.S C. §§ 1343 and 2.

COUNT THREE

And the Grand Jury for the District of Maryland further charges that:

1. Paragraphs One through Twelve of Count One of this Indictment are realleged and incorporated by reference as though fully set forth herein

2. On or about September 20, 1999, in the State and District of Maryland and elsewhere, the defendants

DAVID B. PASQUANTINO
CARL J. PASQVANTINO
TERRY FRASER
FRANCIS A. GILLOTTI
GERARD T. CICCONE
COSMO D. CANDIDO
and
ARTHUR HILTS a/k/a BUTCH

knowingly and willfully executed and attempted to execute the scheme to defraud, in that they caused signs, signals, and sounds to be transmitted by means of wire communication in interstate commerce, that is, a telephone call between CARL J. PASQUANTINO in Niagara Falls, New York, and telephone number 301-829-2210, located in BJ's Liquors in Mt. Airy, Maryland.

Title 18 ,U S.C §§ 393 and 2.

COUNT FOUR

And the Grand Jury for the District of Maryland further charges that:

1. Paragraphs One through Twelve or Count One of this Indictment are realleged and incorporated by reference as though fully set forth herein.

2. On or about September 28, 1999, in the State and District of Maryland and elsewhere, the defendants

DAVID B. PASQUANTINO
CARL J. PASQVANTINO
TERRY FRASER
FRANCIS A. GILLOTTI
GERARD T. CICCONE
COSMO D. CANDIDO
and
ARTHUR HILTS a/k/a BUTCH

knowingly and willfully executed and attempted to execute the scheme to defraud, in that they caused signs, signals, and sounds to be transmitted by means of wire communication in interstate commerce, that is, a telephone call between CARL J. PASQUANTINO in Niagara Falls, New York, and telephone number 301-829-2210, located in BJ's Liquors in Mt. Airy, Maryland.

Title 18 U.S.C. §§ 1343 and 2.

COUNT FIVE

And the Grand Jury for the District of Maryland further, charges that:

1. Paragraphs One through Twelve of Count One of this Indictment are realleged and incorporated by reference as though fully set forth herein.

2. On or about October 2, 1999, in the State and District of Maryland and elsewhere, the defendants

DAVID H. PASQUANTINO
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knowingly and willfully executed and attempted to execute the scheme to defraud, in that they caused signs, signals, and sounds to be transmitted by means of wire communication in interstate commerce, that is, a telephone call between CARL J. PASQUANTINO in Niagara Falls, New York, and telephone number 301-829-2210, located at BJ's Liquors in Mt. Airy, Maryland.

Title 18 U.S.C. §§ 1343 and 2.

COUNT SIX

And the Grand Jury for the District of Maryland further charges that:

1. Paragraphs One through Twelve of Count One of this Indictment are realleged and incorporated by reference as though fully set forth herein.

2. On or about October 16 1999 the State and District of Maryland and elsewhere, the defendants

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knowingly and willfully executed and attempted to execute the scheme to defraud, in that they caused signs, signals, and sounds to be transmitted by means of wire communication in interstate commerce, that is, a telephone call between CARL J. PASQUANTINO in Niagara Falls, New York, and telephone number 301-829-2210, located in BJ's Liquors in Mt. Airy, Maryland.

Title 1° U.S.C. §§ 1343 and 2.

COUNT SEVEN

And the Grand Jury for the District of Maryland further charges that:

1. Paragraphs One through Twelve of Count One of this Indictment are realleged and incorporated by reference as though fully set forth herein.

2. On or about August 26, 1998, in the State and District of Maryland and elsewhere, the defendant

GERARD T. CICCONE

did transport in interstate commerce. a firearm and ammunition to wit: a Winchester Model 1300 Defender 12 gauge shotgun and eight 12 gauge shotgun rounds, with the intent to commit an offense punishable by imprisonment for a term exceeding one year and with reasonable cause to believe that such an offense was to be committed, that is wire fraud and aiding and abetting, as is more fully set forth in the preceding counts of this Indictment. Title 18 U.S.C. § 924(b)

/s/ Lynne A. Battaglia
Lynne A. Battaglia
United States Attorney

A TRUE BILL:
/s/ Michelle Shiemczel
Foreperson